156-218

TRANSCRIPT OF RECORD.

156-218

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM. 1894.

No. 104.

THOMAS R. McGAHAN, D. R. SMITH, AND E. P. SMITH, APPELLANTS,

vs.

THE NATIONAL BANK OF RONDOUT, NEW YORK.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

FILED MARCH 21, 1890.

(14,532.)

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1 THE UNITED STATES OF AMERICA, } *To wit:*
District of South Carolina, Fourth Circuit. }

In the Circuit Court.

At a circuit court of the United States for the fourth circuit in and for the district of South Carolina, begun and holden at Columbia, in the district aforesaid, on the fourth Monday in November, 1890, before the Honorable Hugh L. Bond, circuit judge of the fourth circuit in and for the district of South Carolina, holding said circuit court according to the form of the act of Congress in such case made and provided, the following proceedings were had:

THE UNITED STATES OF AMERICA, }
District of South Carolina, Fourth Circuit. }

In the Circuit Court. Equity.

THE NATIONAL BANK OF RONDOUT, NEW YORK, a National Banking Association under the Acts of Congress, Located in the State of New York, Complainant.

vs.

THOMAS R. MCGAHAN and Mrs. ELIZABETH P. SMITH, Wife of D. R. Smith, and D. R. Smith, All of Them Citizens of the State of South Carolina, Defendants.

Be it remembered that heretofore, to wit, on the 26th day of September, in the year of our Lord one thousand eight hundred and eighty-nine, came into court the complainant, The National Bank of Rondout, New York, by its solicitors, Barker, Gilliland & Fitzsimons, and filed the following bill:

2 *Bill.*

UNITED STATES OF AMERICA, }
District of South Carolina. }

Fourth Circuit. In Equity.

THE NATIONAL BANK OF RONDOUT, NEW YORK, a National Banking Association under the Acts of Congress, Located in the State of New York,

against

THOMAS R. MCGAHAN and Mrs. ELIZABETH P. SMITH, Wife of D. R. Smith, and D. R. Smith, All of Them Citizens of the State of South Carolina.

To the honorable the judges of the circuit court of the United States for the district of South Carolina:

Humbly complaining, show unto your honors your orator, The National Bank of Rondout, New York, a national banking association located in the State of New York—

That on the 30th day of November, 1883; Walter B. Crane was seized and possessed in fee of all the undivided three-fourths of all those tracts and parcels of land situate in the county of Williamsburg and State of South Carolina, containing eighteen hundred and thirty-six acres according to a survey and plat thereof made by Wm. Ervin the 27th day of September, 1866; also another tract, on which the former residence of A. W. Dozier stands, separated from the tract first above named by Clark's creek, and containing two thousand seven hundred and nine acres according to a resurvey and plat thereof made by Wm. Ervin the 27th day of September, 1866;

Also one other tract, on which the above-named A. W. Dozier's summer house stands, and separated from the second tract above mentioned by the public road leading from Sockee bridge, by Mrs. Stone's residence, to the old mill known as Johnson's mill, and containing one thousand and seventy-five acres according to a resurvey and plat thereof made by Wm. Ervin the 27th day of April, 1867, the said lands having such forms, marks, buttings, and boundings as on reference to said several plats will more fully and at large appear—

3 The said three tracts constituting one united body of land and containing in the aggregate five thousand six hundred and twenty acres, situate, lying, and being on the south side of Big Pee Dee river, in the county of Williamsburg and State of South Carolina, and known as Longwood plantation, and being the same premises conveyed to George North by A. W. Dozier by deed bearing date the sixth day of May, 1869, and recorded in the clerk's office of Williamsburg county, in Book —, pages 361 & 362, of the eighth day of May, 1869.

Also all the undivided three-fourths of all that certain tract or parcel of land known by the general appellation of Britton's Ferry, containing five hundred acres, more or less, and situated, lying, and being partly in Williamsburg county and partly in Georgetown county, in the said State of South Carolina; the boundaries of said tract of land are described in a deed from Mary A. Eaddy to C. W. Martin, bearing date 10th August, 1860, being as follows: On the north by land of E. H. Britton, on the east by Pee Dee river, on the south by lands of S. J. White, and on the west by lands of W. A. Lairdmore, and being the premises or same lands conveyed to George North by C. W. Martin, and the deed of which is recorded in the office of register of mesne conveyance-, Georgetown, S. C., June 5th, 1869, in Book B, page- 471 & 472.

That on the said day of November, 1883, in order to secure the endorsement by said Walter B. Crane of four certain promissory notes, amounting in the aggregate to twelve thousand dollars, and every renewal and renewals thereof, said notes being made by David R. Smith and Walter B. Crane under the firm name of D. R. Smith & Co. and endorsed by Walter B. Crane, then and there held by said National Bank of Rondout, New York, the said Walter B. Crane and Eliza E. Crane, his wife, did then and there make and execute to your orator, said National Bank of Rondout, a mortgage

of all and singular the undivided three-fourths interest in and to the said tracts of land aforesaid, and that said mortgage was properly recorded in the office of the register of mesne conveyance- for Georgetown county, in South Carolina, on 27th February, 1885, and in the corresponding office of Williamburg county, of said State, on the 6th March, 1885; that on the 6th, 17th, and 29th days of June and on the 3rd of July, 1885, said debt became due, and the said Walter B. Crane departed this life, to wit, on the 5th day of September, 1887, leaving said debt unpaid and leaving surviving him his said wife, Eliza E. Crane; that on the — day of December, 1887, your orator recovered judgment in the circuit court of the United States for the district
4 of South Carolina on said promissory notes for the sum of $—; that after the execution of the said mortgage and subsequent to the record thereof the said realty covered thereby was sold by the marshal of this court by virtue, as is claimed, of sundry executions in his office, and all the right, title, and interest of said firm of D. R. Smith & Co., a firm composed of D. R. Smith & W. B. Crane, and of D. R. Smith individually therein was conveyed to Thomas R. McGahan by deed of said marshal, who entered into possession thereof and, as your orators are informed, has leased the same to Mrs. Elizabeth P. Smith, the wife of D. R. Smith; that the said lands are timber lands of great value because of the timber thereon and are only valuable for this reason; and your orators further state upon information and belief that the said Thomas R. McGahan or his said tenant or some person by his authority have been and are cutting down the timber on said land and have removed and are removing the same, thus committing waste upon and destroying the value of the said land and of the security held by the said bank; but now so it is, may it please your honors, that the said defendant, combining and confederating with certain persons by your orators unknown, but whose names, and so forth, wholly neglect and refuse to desist from this unlawful conduct or to account for the timber cut, and for this set up certain unfounded pretences, at one time pretending that the said Thomas R. McGahan is the owner of said lands and entitled to hold the same free of any claim of your orators, the said bank, and of your other orators, which pretence is without foundation, and at other times setting up other pretences equally unfounded; all of which are contrary to equity and good conscience and tend to the manifest wrong and injury of your orators. In tender consideration whereof, and so forth.

To the end, therefore, that the defendants may answer the premises; that they may set forth and discover the claim under which they are in possession of said lands and how the same was acquired and upon what facts it is based; that they may be enjoined under the order of this court from committing further waste on said lands, and especially from cutting down and removing any timber from said lands; that they may set forth and discover the amount and number and value of the trees cut by them or any of them or by their authority since the said Thomas R. McGahan came into control or

possession thereof or by any of them under his authority; that
5 they account to the court for the said value; that they be permitted a reasonable time within which to redeem the said mortgage, if perchance it shall appear that they or any of them have the equity of redemption thereof, and that, failing so to do, on a day fixed by your honors, the equity of redemption be barred and the said property be sold and the proceeds of sale applied to the debt of the said bank, with all interest accrued and to accrue thereon; and for such other and further relief in the premises as to your honors may seem meet. May it please your honors to grant unto your orator as well your writ of injunction, to be directed to the said Thomas R. McGahan, his lessee or lessees, his or their agents and servants, commanding and enjoining them to cease committing any further waste on said lands hereinbefore described, and especially from removing any fixtures belonging to the realty, and from cutting down or removing any timber or timber trees thereon—

As also your writ of subpœna, to be directed to the said Thomas R. McGahan, Mrs. Elizabeth P. Smith, and D. R. Smith, commanding and requiring them, on a certain day and under a certain pain therein to be mentioned, to be and appear in this honorable court, then and there to answer the premises, and to stand to and abide by and perform such order and decree herein as to your honors may seem meet; and your orators will ever pray, and so forth.

BARKER, GILLILAND & FITZSIMONS,
Complainant's Solicitors.

STATE OF NEW YORK, }
County of Ulster, } ss:

George H. Sharpe, of said county, being duly sworn, says that he has read the foregoing bill and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true; that the reason why this verification is not made by the plaintiff is that the plaintiff is a corporation and deponent is an officer thereof, to wit, the president thereof.

GEORGE H. SHARPE.

Sworn to before me this 20th day of September, 1889.

C. E. HASBROUCK,
Notary Public.

6 And on the 26th day of September, 1889, came into court the complainant, by its solicitors, Barker, Gilliland & Fitzsimons, and filed the following subpœna:

Subpœna.

UNITED STATES OF AMERICA. }
Fourth Circuit, District of South Carolina. }

The President of the United States of America to Thomas R. McGahan and Mrs. Elizabeth P. Smith, the wife of D. R. Smith, and D. R. Smith, all of them citizens of the State of South Carolina:

You are hereby strictly commanded and firmly enjoined that, all manner of excuses being laid aside, you be and appear before the judges of the circuit court of the United States for the district of South Carolina, at Charleston, on the fourth day of November, 1889, twenty days after the service thereof, then and there true and perfect answer to make, upon your corporal oath on the Holy Evangelists, to all such matters as shall be objected against you in the bill of complaint of The National Bank of Rondout, New York, a national banking association under the acts of Congress, located in the State of New York.

And also that you do, on the rules day next immediately after the day appointed and expressed, file or cause to be filed in the registry of said court your plea, answer, or demurrer to the said bill of complaint.

Hereof fail not, under the pain of one hundred pounds.

Given under the seal of the said court.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States of America, at Charleston, South Carolina, district aforesaid, the twenty-sixth day of September, in the year of our Lord one thousand eight hundred and eighty-nine, and in the one hundred and fourteenth year of the sovereignty and Independence of the United States of America.

BARKER, GILLILAND & FITZSIMONS,
Complainant's Solicitors.

J. E. HAGOOD,
[SEAL] *C. C. C. U. S., Dist. S. C.*

Filed 26th September, 1889.
7 Entered in Docket Book, folio 138.

G. I. CUNNINGHAM,
U. S. Marshal.

September 26th, 1889.

H. W. Hendricks, deputy U. S. marshal, being duly sworn, says he served a copy of within process on T. R. McGahan by leaving said copy at his place of business in Charleston, S. C., on September 28th, 1889.

H. W. HENDRICKS,
Deputy U. S. Marshal.

Sworn to before me this 5th day of October, 1889.

J. E. HAGOOD,
C. C. C. U. S., Dist. S. C.

THE STATE OF SOUTH CAROLINA, }
County of Williamsburg. }

THE NATIONAL BANK OF RONDOUT }
vs.
THOMAS R. MCGAHAN, ELIZABETH P. SMITH, and D. R. SMITH. }

James Thorpe, deputy marshal, being duly sworn, says that on the 1st day of October, 1889, he personally served each of the parties for whom he had copies, to wit, D. R. Smith, by giving him a copy in person, and Elizabeth P. Smith, by leaving a copy at her place of residence with her husband, she being absent from the State, at Smith's Mills, in Williamsburg county, in the State of South Carolina, and travelled in serving said writ 36 miles additional, going one way from Kingstree, S. C.

JAMES THORPE.

Sworn to before me this October 3rd, 1889.

[L. S.] JOHN A. KELLEY, *Not. Pub.*

8 And on the 4th day of November, 1889, came into court the defendants, Mrs. Elizabeth P. Smith and D. R. Smith, by their solicitor, Samuel Lord, and filed the following notice of appearance:

Notice of Appearance.

THE UNITED STATES OF AMERICA, }
District of South Carolina, Fourth Circuit. }

In the Circuit Court.

THE NATIONAL BANK OF RONDOUT, NEW YORK, }
vs.
THOMAS R. MCGAHAN *et al.* }

I hereby appear as counsel for Mrs. Elizabeth P. Smith and D. R. Smith, defendants in above action.

SAMUEL LORD.

Filed 4th November, 1889.

9 And on the 4th day of November came into court the defendant Thomas R. McGahan, by his solicitor, J. N. Nathans, and filed the following notice of appearance:

Notice of Appearance.

THE UNITED STATES OF AMERICA,
District of South Carolina, Fourth Circuit.

In the Circuit Court. In Equity.

THE NATIONAL BANK OF RONDOUT, Rondout, N. Y.,
vs.
THOMAS R. MCGAHAN and ELIZABETH P. SMITH *et al.*

I appear as the solicitor for Thomas R. McGahan, one of the defendants in this action.

J. N. NATHANS,
Def'd't's Sol'r.

4th November, 1889, rules day.

To the clerk of the U. S. circuit court, dist. of S. C.

Filed 4th November, 1889.

And on the 4th day of January, 1890, came into court the defendants, by their solicitors, J. N. Nathans and Samuel Lord, and filed the following answer:

Answer.

10 THE UNITED STATES OF AMERICA,
District of South Carolina.

Fourth Circuit. In Equity.

THE NATIONAL BANK OF RONDOUT, a National Banking Association under the Acts of Congress, in the State of New York,
vs.
THOMAS R. MCGAHAN and Mrs. ELIZABETH P. SMITH, Wife of D. R. Smith, and D. R. Smith, All of Them Citizens of the State of South Carolina.

The joint and several answer of Thomas R. McGahan, Elizabeth P. Smith, and D. R. Smith, citizens of the State of South Carolina, to the bill of complaint of the National Bank of Rondout, a national banking association under the acts of Congress, located in the State of New York.

To the honorable the judges of the circuit court of the United States for the district of South Carolina:

These defendants, now and at all times hereafter saving and reserving to themselves and each of them all benefit and advantage of exception which can or may be had or taken to the manifold errors, omissions, imperfections, and uncertainties in the complainant's bill of complaint contained, for answer thereunto or unto so much thereof as these defendants are advised is or are material or

necessary for them or any of them to make answer unto, they, these defendants, severally answering, say—

That on the 30th day of August, 1869, articles of copartnership, under the name and style of D. R. Smith & Co., were entered into between George North, Walter B. Crane, Edward Tompkins, and the defendant David R. Smith, whereby the several tracts of land described in the complainant's said bill of complaint were to be purchased and held as the property of said copartnership, to be used for agricultural purposes and for the manufacture of lumber; that machinery was purchased, a large mill erected, and other improvements put upon said premises by said copartnership; that thereafter the interest of said George North and Edward Tompkins in said copartnership was purchased by said Walter B. Crane, who, with the defendant David R. Smith, continued said business under the firm name of D. R. Smith & Co.; that the said premises were in the notorious possession of the defendant D. R.
11 Smith as resident copartner as and for copartnership property, and complainant knew or had means of knowing that it was such, the said Walter B. Crane being at the time of the execution of the mortgage alleged to have been made to the complainant vice-president of said corporation.

That the said mortgage was executed without the knowledge or consent of the said David R. Smith and the property so mortgaged was first subject to the rights of creditors of said copartnership.

That under and by virtue of writs of execution issued out of this honorable court and directed to the marshal thereof, dated the 28th day of April, A. D. 1885, on a judgment recovered by M. Brown, Sons & Co. against the said firm of D. R. Smith & Co. and D. R. Smith individually for the sum of $1,446.83, and on a judgment recovered by Daniel C. Stelling against the said D. R. Smith & Co. and D. R. Smith individually for $9,397.17, the property described in the said bill of complaint was levied upon and sold by said marshal at public outcry on the 7th day of September, A. D. 1885, to the defendant Thomas R. McGahan for the sum of $3,850, he being at that price the highest bidder for the same, and a deed of conveyance, dated the said 7th day of September, 1885, was thereafter duly executed by said marshal to the defendant Thomas R. McGahan; that the defendant Elizabeth P. Smith is now in possession of said premises under a lease from the said Thomas R. McGahan and carrying thereon the business of manufacturing lumber, and for that purpose has used such timber as is necessary for said purpose; that the principal value of said property consists in a large steam saw-mill and other improvements put upon the same by said copartnership, which were levied upon as personal property under said executions and purchased by said Thomas R. McGahan in June, 1885, and that the said mortgage could not and did not purport to cover the same.

And the defendant Thomas R. McGahan, further answering, alleges that by virtue of said sale and purchase as aforesaid he became and is the owner of the premises described in said mortgage, and that the said premises having by the terms of the articles of

copartnership been held as and for copartnership property, were first liable to copartnership debts in priority to the individual interest of the copartners therein, and that by virtue of the sale and his purchase as aforesaid he is entitled to hold and enjoy the same free from the lien of said mortgage.

12 And these defendants deny all and all manner of unlawful combination and confederacy wherewith they are by the said bill charged; without this, that there is any other matter, cause, or thing in the said complainant's said bill of complaint contained material or necessary for these defendants to make answer unto and not herein and hereby well and sufficiently answered, confessed, traversed, and avoided or denied is true to the knowledge or belief of these defendants; all of which matters and things these defendants are ready and willing to aver, maintain, and prove as this honorable court shall direct; and they humbly pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

J. N. NATHANS,
LORD & HYDE,
Def'd'ts' Sol'rs.

STATE OF SOUTH CAROLINA,)
Williamsburg County.)

Personally appeared D. R. Smith and Elizabeth P. Smith, who, being duly and severally sworn, say that the matters and things stated in the foregoing answer are true so far as the same are stated on their own knowledge, and as to those stated on information and belief they believe to be true.

ELIZABETH P. SMITH.
D. R. SMITH.

Sworn to before me this 27th day of December, A. D. 1889.

J. C. DAVIS, [L. S.]
Notary Public.

STATE OF SOUTH CAROLINA,)
Charleston County.)

JAN. 2ND, 1889.

Thomas R. McGahan, being duly sworn, says the foregoing answer is true to his own knowledge except as to matters stated on information and belief, and as to those he believes it true.

THOMAS R. McGAHAN.

SAMUEL WILEY,
[SEAL.] *Notary Public.*

13 And on the 3rd day of March, 1890, came into court the complainant, by its solicitors, Barker, Gilliland & Fitzsimons, and filed the following order for leave to file replication:

Order.

THE UNITED STATES OF AMERICA,
District of South Carolina, Fourth Circuit.

In the Circuit Court.

THE NATIONAL BANK OF RONDOUT, Rondout, N. Y.,
vs.
THOMAS R. MCGAHAN *et al.*

The counsel of defendants who have answered in above-entitled cause having consented, on motion of counsel of complainant—

Ordered that complainant have leave to file its replication therein.

CHARLES H. SIMONTON,
U. S. Judge.

3rd March, 1890.

Filed 3rd March, 1890.

And on the 3rd day of March, 1890, came into court the complainant, by its solicitors, Barker, Gilliland & Fitzsimons, and filed the following replication:

Replication.

14 UNITED STATES OF AMERICA,
District of South Carolina.

Fourth Circuit. In Equity.

THE NATIONAL BANK OF RONDOUT, a National Banking Association, under the Acts of Congress, in the State of New York,
vs.
THOMAS R. MCGAHAN and Mrs. ELIZABETH P. SMITH, Wife of D. R. Smith, and D. R. Smith, All of Them Citizens of the State of South Carolina.

The replication of The National Bank of Rondout, Rondout, New York, a national banking association, complainant, to the answer of Thomas R. McGahan, Elizabeth P. Smith, and D. R. Smith, citizens of the State of South Carolina, defendants.

This repliant, saving and reserving unto himself now and at all times hereafter all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer, for replication thereunto says that he will aver, maintain, and prove his said bill of complaint to be true, certain, and sufficient in law to be answered unto, and that the said answer of the said defendants is uncertain, untrue, and insufficient to be replied to by this repliant; without this, that any other matter or thing whatsoever in the said answer contained material or effectual

in the law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things this repliant is and will be ready to aver, maintain, and prove as this honorable court shall direct, and humbly prays as in — by his said bill he has already prayed.

BARKER, GILLILAND & FITZSIMONS,
Complainant's Solicitors.

We acknowledge due service of the within replication and consent that it be filed *nunc pro tunc.*

LORD & HYDE,
Def'd'ts' Sol'rs.
J. N. NATHANS,
Def'd'ts' Sol'r.

15 And on the 15th day of August, 1890, came into court the complainant, by its solicitors, Barker, Gilliland & Fitzsimons, and filed the following order of reference:

Order of Reference.

THE UNITED STATES OF AMERICA, }
District of South Carolina, Fourth Circuit. }

In the Circuit Court.

THE NATIONAL BANK OF RONDOUT, Rondout, New York, }
vs.
THOMAS R. MCGAHAN and Others. }

Order of reference to take and report the testimony.

On motion of Barker, Gilliland & Fitzsimons and with the consent of J. N. Nathans, Esq., solicitor for Thomas R. McGahan, and Samuel Lord, Esqr., solicitor for D. R. Smith and Elizabeth P. Smith, his wife—

It is ordered that it be referred to G. W. Dingle, Esquire, as examiner and special master, to take and report the testimony which may be produced before him by the parties to above-entitled cause.

CHARLES H. SIMONTON,
U. S. Judge.

J. N. NATHANS.
SAMUEL LORD.

15th August, 1890.

Filed 15th August, 1890.

16 And on the 2nd day of December, 1890, came into court the special master and filed the following report, with exhibits:

Report of Special Master.

UNITED STATES OF AMERICA, }
District of South Carolina, Fourth Circuit. }

In the Circuit Court.

Under an order of reference of the Honorable Charles H. Simonton, of date the 15th August, 1890, I beg leave to report the following testimony produced by the parties to the above-entitled cause:

Reference 11th November, 1890.

Present: T. G. Barker, Esjr., for complainants; Samuel Lord, Esqr., representing D. R. Smith and Elizabeth Smith, his wife, defendants; J. N. Nathans, Esqr., representing Thomas R. McCahan, defendant.

Mr. Barker offered the following documentary evidence:

1. Agreed statement of facts, Exhibit "No. 1."
2. Mortgage of Walter B. Crane and wife to National Bank of Rondout, "No. 1*a*."
3. George North to Walter B. Crane, conveyance, Exhibit "*b*."
4. George North to Edward Tomkins, warranty deed, Exhibit "*c*."
5. George North to W. B. Crane, warranty deed, Exhibit "*d*."
6. George North to Edward Tompkins, conveyance, Exhibit "*e*."
7. David R. Smith to Walter B. Crane, mortgage, Exhibit "*f*."
8. David R. Smith to Edward Tomkins, mortgage, Exhibit "*g*."
9. Inter. W. B. Crane, George North, and E. Tomkins, agreement, Exhibit "*h*."
10. Inter. E. Tomkins and W. B. Crane, agreement, Exhibit "*i*."
11. E. M. Boykin, U. S. marshal, to Thomas R. McGahan,
17 copy conveyance, Exhibit "*j*."
12. Edward Tomkins to Walter B. Crane, assignment of mortgage, Exhibit "*k*."
13. L. F. Dozier, ex'or, to George North, satisfaction piece, Exhibit "*l*."

The commission taken at Rondout was then opened by consent and read. Commission marked Exhibit No. 2. Defendants noted an objection to an answer to interrogatory No. 26 and to so much thereof as is hearsay evidence.

Defendants put in evidence the following papers:

D. R. Smith & Co., agreement, Exhibit No. 3 "*a*."

Copartnership, D. R. Smith & Co., Exhibit No. 3 "*b*."

G. W. DINGLE,
Special Master.

Reference 18th November, 1890.

Present: Mr. Barker, for plaintiff; Messrs. Lord and Nathans, for def'd'ts.

G. W. DAVIS, witness for plaintiff, sworn: I live in Williamsburg

county, 6 miles from Smith's mills; have known D. R. Smith since 1869. He was living in my neighborhood.

Mr. Smith was manufacturing pine and cypress by sawing it at Smith's mill; also planting.

The Smith mill property, including the Longwood plantation, consists of lands bought of C. W. Martin, on which D. R. Smith & Co. erected this mill, and is known as the Britton's Ferry tract. I don't know who furnished the money for the mill. Mr. North, I think, bought the property and deeded it to D. R. Smith. I have heard that Crane was interested in D. R. Smith & Co., but to what extent I do not know. When first started a man named Tomkins was interested; first Crane and Tomkins and then more recently W. B. Crane. The whole thing was known as D. R. Smith

18 & Co.

I don't know of a tract of 1,836 acres. I know of a tract of land on which the summer house stands of Dozier, all looked upon as the Longwood tract. The property on which the mill stands was appraised in April, 1885. I was present at the appraisement; I swore in the appraisers. I learned that Smith's creditors had sued him, and the property was attached and the appraisement followed.

I estimate the value of the property in 1885 as follows: The Longwood property was appraised at $25,000.

Defendant objects to entire evidence as to value as irrelevant, and testimony subject to objection.

This included the land, stock, farming implements, and all the appurtenances. I thought they were long figures. I am not in a position to approximate the value of the property; I don't know the number of acres. There is a large body of swamp land, subject to inundation and freshets.

I think $20,000 would be about the value of the Longwood plantation in 1885.

I think that the appraisement of $50,000 for Britton's Ferry tract, the mill, machinery, and buildings, was about the value.

There are about eight buildings on the Longwood plantation, small and large. On the mill tract in 1885, including the mill, there were about twenty buildings. The mill is a large building, 300 feet long, one story under ground, with the driving machinery, and on the second story is where the saws are and the lumber is cut.

On the mill tract there were nine or ten residences, with hall and two rooms each, cheaply constructed, for the use of the hands. There was also Smith's own residence, a neat two-story wooden building. Capt. Smith had a stable, a barn, and a store, small and cheaply constructed.

This mill was on the Pee Dee river. There is a landing at the mill and a public landing ¼ mile above, not the property of the mill, called Staple's Lake.

19 The lumber business was carried on previous to 1885 by D. R. Smith & Co. They were burnt out in 1880 and started

again in 1882, and the business was conducted in the firm name of D. R. Smith & Co. up to 1885, and since then the mill business has been run by E. P. Smith. The hands at the plantation and at the mill are paid off by the clerk of E. P. Smith & Co.

The lumber business has been pretty well kept up since 1885; about as good now as at any time. They get timber from Pee Dee river—up the river; lumber is shipped by seagoing schooners towed from Georgetown up the river—generally two-masted schooners with capacity for from 150 to 175,000 feet of lumber. There is on an average one schooner a month at the mill's loading.

They ship cypress, lumber, and shingles. They cut plank, bridge stuff, and all kinds of first-class cypress.

The value of the lumber, as he heard from G. W. Stokes, superintendent of shingle department of the mill, is $40 per thousand.

Objected to and taken down subject to objection.

The same man, Staples, told him the freight was $10.00 per thousand. I know D. R. Smith's handwriting. I am familiar with it; have seen him write.

2 letters of D. R. Smith to W. B. Crane, September 11th, 1885, put in evidence.

Introduction of these letters objected to by Mr. Nathans, attorney for defendant Thomas R. McGahan. Letters marked Exhibit No. 4 "*a*," No. 4 "*b*."

Cross-examination:

This land is about 29 miles from the N. E. railroad at the nearest point—that is, the Smiths' mills. The Longwood property is 4 miles nearer the road.

Q. How far to Georgetown by the river?

A. About 60 miles by water, about 36 by land. Vessels have to be towed all the way from Georgetown coming to the mill.

The farming land of Longwood was valued at about $3.00 an acre and wood land about $1.50 per acre. I can't say how much arable and how much wood land was on the tract. They run a seven-mule farm, which would be about 150 acres cultivated. I don't know how many acres in the whole tract; there are several thousand acres, I know.

Q. What proportion of the Longwood plantation is swamp land?

A. A large proportion, embracing Snow's island. I would think about one-fourth is swamp land. I can't estimate the value of the swamp land; it is used for stock, subject to inundation, and stock is frequently lost in trying to rescue it.

Q. When you say the land is worth a certain price, do you mean that it would bring that price after full opportunity to find purchasers and on the usual terms of cash and credit, or do you mean that it would bring that price if put up at a forced sale after three

weeks' advertisement, to be paid for in cash, whether the title to the property was good or not?

A. When I said the land was worth $3.00 an acre for arable land and $1.50 for wood land I meant that that was the assessed valuation of taxable real estate in Williamsburg county. As to the Longwood plantation, I don't know if it would bring that price at public outcry, at forced sale. As to the mill property, on a forced sale for cash, after three weeks' notice, I think it would bring that price.

Q. Are you a miller?

A. No.

Q. Have you ever run a mill?

A. No.

Q. State facts within your own knowledge on which you base your estimate that the mill property in April, 1885, was worth $50,000.

A. I will state from my own judgment that the property was worth that amount. I have no opportunity of ascertaining
21 even the approximate cost of these improvements.

G. W. DAVIS.

Sworn to before me this 18th November, 1890.

G. W. DINGLE,
Special Master.

Reference 19th November, 1890.

Present: Mr. Barker, for plaintiff; Messrs. Lord and Nathans, for def'd'ts.

JAMES C. LYNCH, witness for plaintiff, sworn.

I am 50 years old. I merchandize and farm. I live in Florence county—part that was Williamsburg. I live about 35 miles from Smith's mills.

I know the country about Smith's mills in trading and otherwise. I know A. W. Dozier by reputation. He is now deceased. He lived near Snow's island, an island in the Pee Dee river. I know the tract called the Longwood plantation. Snow's island is a part of that plantation. I don't think there is over 150 acres of cleared land on the Longwood plantation now nor was five years ago. It is quite a large body of land; most of it swamp and old field. The timber has been used off. There is principally undergrowth in the swamp. Cypress has been taken off years ago. More was also oak and ash.

I know the Britton's Ferry tract. Martin owned it formerly. I don't know what are dimensions of tract.

The Longwood plantation, 5,620 acres, consisting of three tracts, as follows:

Snow-island tract, 1,836 acres; Home tract, 2,709 acres; Summer-house tract, 1,075 acres.

I would value at one $\frac{50}{100}$ dollars an acre outside the farming land. The farming land I would value at three dollars an acre. This is

my judgment of the value of the land and the rate at which it is assessed.

22 As to the Britton Ferry tract, with mill, machinery, and buildings, I think the land valueless, except for mill purposes. In April, 1885, I don't think this property was worth more than from 12,000 to 15,000.

If fully advertised and sold in 1885 to people desirous to buy mill property I don't think it would bring over 15,000. This on account of its condition. The machinery was considerably worn.

Cross-examination:

I was present at the marshal's sale. It was a pretty good crowd. I don't know if Davis, witness, was present.

I don't remember how many persons bid. There was more than one bid. I don't remember who bid.

J. C. LYNCH.

Sworn to before me this 19th November, 1890.

G. W. DINGLE,
Special Master.

Testimony closed.
Filed 2nd December, 1890.

23 EXHIBIT No. 1.

Agreed Statement of Facts.

UNITED STATES OF AMERICA,
District of South Carolina, Fourth Circuit.

In the Circuit Court.

THE NATIONAL BANK OF RONDOUT, Rondout, New York,
vs.
THOMAS R. MCGAHAN and Others.

The following statement of facts is mutually agreed to by counsel in above-entitled cause, and may be used by either party to the hearing without further proof being required:

1st. It is agreed that the following papers be admitted in evidence without further proof, viz., those introduced by complainant being:

(*a.*) Walter B. Crane & wife to the National Bank of Rondout, mortgage recorded in Georgetown county on 27th February, 1885, Book G, p. 512–515, and recorded in Williamsburg county 6th March, 1885, Book U, p. 137–140, and certified copy of same.

(*b.*) George North to Walter B. Crane, conveyance recorded in Georgetown, Book B, p. 520–521, and in Williamsburg, in Book L, p. 54–55.

(*c.*) George North to Edward Tomkins, deed dated November 28th, 1871, recorded January 20th, 1872, Book D, p. 75–77, and in Williamsburg in Book M, p. 295–297.

(*d.*) George North to W. B. Crane, deed recorded in Georgetown county, Book D, p. 73–75, and in Williamsburg county, Book M, p. 293–295.

(*e.*) George North to Edward Tomkins, conveyance recorded in Georgetown county, Book B, p. 518–519, and in Williamsburg county, Book L, p. 51–52.

(*f.*) Mortgage of David R. Smith to Walter B. Crane for
24 $1,322.00, dated August 28th, 1869. (Executed, but apparently not recorded.)

(*g.*) Mortgage of David R. Smith to Edward Tomkins for $1,322.00, dated August 28th, 1869. (Executed, but apparently not recorded.)

(*h.*) An assignment by George North of his interest to W. B. Crane and Edward Tomkins, December 29th, 1871. (Executed, but not recorded.)

(*i.*) Agreement, dated March 1st, 1877, between E. Tomkins and W. B. Crane, by which E. Tomkins released from all debts of firm of D. R. Smith & Co. except seven (7) certain notes in Bank of Rondout, also dissolving firm of D. R. Smith & Co.

(*j.*) Certified copy of conveyance of E. M. Boykin to Thomas R. McGahan, dated September 7th, 1885, recorded in Williamsburg county in Book Q, p. 558–561.

(*k.*) An unrecorded assignment of mortgage by Edward Tomkins to Walter B. Crane, dated April 24th, 1877.

(*l.*) Satisfaction of mortgage given by L. F. Dozier, executor, to George North and recorded in Williamsburg county in Book M, p. 434, 435.

Papers introduced by defendants, being all copartnership articles and endorsements mentioned in paragraph 8th below.

2nd. That on November 30th, 1883, for the purpose of securing four (4) certain promissory notes described in said mortgage, amounting in the aggregate of principal to twelve thousand dollars, and every renewal or renewals thereof, said notes being made by D. R. Smith & Co. (a firm composed of D. R. Smith and Walter B. Crane) and endorsed by Walter B. Crane, and being then held by the National Bank of Rondout, Rondout, New York, a corporation duly chartered and organized under the laws of the United States and located at Rondout, in the State of New York, the said Walter B. Crane and Eliza F. Crane, his wife, executed the mortgage referred to in the pleadings, and that said mortgage was duly recorded in the office of register of mesne conveyances for Georgetown, S. C., on the 27th February, 1885, and in the corresponding office of Williamsburg county, of the State of South Carolina, on the 6th of March, 1885.

25 3rd. That on the 6th, 17th, and 18th days of June and on the 3rd day of July, 1885, the renewals of said notes were given dated on said dates and payable at three months after date, at which last dates said debt became due.

4th. That said Walter B. Crane departed this life on the — day of ——-, 1887, leaving said debt due and unpaid.

5th. That on the 15th day of December, 1887, complainant re-

covered judgment in the circuit court of the United States on said notes so endorsed against D. R. Smith & Co., the makers, for the sum of thirteen thousand eight hundred and forty-four $\frac{74}{100}$ dollars.

6th. That on the seventh day of September, 1885, the U. S. marshal of this district, under certain executions issued on judgments entered on April 27th, 1885, respectively in favor of M. Brown, Sons & Co. against D. R. Smith & Co. and against D. R. Smith individually and in favor of Daniel Stelling against the same, sold all the right, title, and interest of said firm of D. R. Smith & Co. (composed of D. R. Smith and Walter B. Crane) and of D. R. Smith individually therein, and the same was conveyed to Thomas R. McGahan by deed of said marshal, and that on the 20th November, 1885, said Thomas R. McGahan leased said premises to Elizabeth P. Smith, wife of D. R. Smith.

7th. That under said lease said Elizabeth P. Smith has been operating the saw-mill and has caused to be cut down timber thereon and sawed it up and removed the products of the mill from the land and is continuing so to do.

8th. That the copartnership articles of May 1st, 1869, between Walter B. Crane, Edward Tomkins, George North, and David R. Smith, be admitted without formal proof of execution, and also articles of copartnership between the same parties, dated 30th August, 1869, with the endorsements thereon, be admitted without formal proof.

9th. That at the times of all the transactions dated in the complaint, to wit, execution of the notes and renewals and of the mortgage, and at the time the notes were received by the National
26 Bank of Rondout Walter B. Crane was the vice-president; that the notes were made and signed by W. B. Crane for D. R. Smith and Company, and that the notes so secured were renewal of notes running back to 1880.

10th. That D. R. Smith was on the 30th of November, 1883, and prior thereto and up to the time of the death of W. B. Crane the resident copartner in South Carolina, carrying on the business of D. R. Smith and Company on the mortgaged premises and in possession thereof.

BARKER, GILLILAND & FITZSIMONS.
J. N. NATHANS.
SAMUEL LORD.

27 EXHIBIT No. 1 "*a*."

This indenture, made this thirtieth day of November in the year of our Lord one thousand eight hundred and eighty-three, between Walter B. Crane and Eliza F., his wife, of the city of Kingston, county of Ulster, and State of New York, parties of the first part, and the National Bank of Rondout, of the same place, party of the second part, witnesseth, that the said parties of the first part, in consideration of the sum of twelve thousand ($12,000) dollars, to them duly paid have granted, bargained, sold, and conveyed, and by these presents do grant and convey to the said party of the

second part, and to its successors and assigns, the undivided three-fourths of all those tracts and parcels of land situate in the county of Williamsburg and State of South Carolina, lying on Snow's island, containing eighteen hundred and thirty-six acres, according to a resurvey and plat thereof, made by Wm. Ervin the 27th day of September 1866.

Also another tract on which the former residence of A. W. Dozier, stands, separated from the tract first above named by Clark's creek and containing two thousand seven hundred and nine acres according to a resurvey and plat thereof made by Wm. F. Ervin, the 27th day of September 1866.

Also one other tract on which the above-named A. W. Dozier's summer house stands and separated from the second tract above mentioned by the public road leading from Sockee bridge by Mrs. Stone's residence to the old mill known as Johnson's mill and containing one thousand and seventy-five acres, according to a resurvey and plat thereof made by Wm. F. Ervin 27th day of April 1867.

The said lands having such forms, marks, buttings and boundaries as on reference to said several plats will more fully and at large appear.

The said three tracts constituting one united body of land and containing in the aggregate five thousand six hundred and twenty acres (5,620), situated lying and being on the south side of Big Pee Dee river, in the county of Williamsburg, in the State of
28 South Carolina, and known as Longwood plantation and being the same premises conveyed to George North by A. W. Dozier by deed bearing date the sixth day of May 1869, and recorded in the clerk's office of Williamsburg county in Book K, pages 361 & 362, on the eighth day of May 1869.

Also all the undivided three-fourths of all that certain tract or parcel of land known by the general appel-ation of Britton's Ferry, containing five hundred acres more or less, and situate lying and being partly in Williamsburg county and partly in Georgetown county in the said State of South Carolina, the boundaries of said tract of land are described in a deed from Mary A. Eddy to C. W. Martin, bearing date 10th of August, 1860, being as follows: On the north by lands of E. H. Britton, on the east by Pee Dee river, on the south by lands of S. J. White and on the west by lands of W. A. Lariamore and being the premises or same lands conveyed to George North by C. W. Martin and the deed of which is recorded in the office of register mesne conveyances, Georgetown, S. C., June 5th, 1869, in Book B, pages 471 and 472.

This grant is intended as a security for the payment of the four certain promissory notes, amounting in the aggregate to twelve thousand dollars, or the renewal or renewals of them, or either, or any of them, together with the lawful discount or interest thereon. Said notes being made by David R. Smith and Walter B. Crane under their firm name of D. R. Smith & Co., and endorsed by Walter B. Crane and Henry M. Crane, and payable at the National Bank of Rondout, and are described as follows: The first being

made for $3,000, dated August 27th, 1883, payable three months after date. The second being made for $3,000, dated September 8th, 1883, payable three months after date. The third being made for $3,000, dated September 14th, 1883, payable three months after date, and the fourth being made for $3,000, dated November 17th, 1883, payable three months after date; and this conveyance shall be void if such payment be made as herein specified. And in case default shall be made in the payment of the said notes hereby intended to be secured, or in the payment of the interest, or discount thereof, or any part of such notes or interest, or discount as above provided, it shall be lawful for the party of the second part, its successors, or assigns, at any time thereafter, to sell the premises hereby granted, or any part thereof, in the manner prescribed by law, and out of all the moneys arising from such sale, to retain the amount then due for principal and interest, together with the cost and charges of making such sale, and the overplus, if any there be, shall be paid by the party making such sale, on demand, to the said Walter B. Crane his heirs or assigns.

And it is also agreed, by and between the parties to these presents, that the said parties of the first part shall and will keep the building erected and to be erected upon the lands above conveyed, insured against loss or damage by fire, by solvent insurers, and in amount of at least $12,000, and assigns the policy and certificate thereof to the said party of the second part; and in default thereof, it shall be lawful for the said party of the second part to effect such insurance, as mortgagee or otherwise, and the premium or premiums paid for effecting and continuing the same, shall be a lien on said mortgaged premises, added to the amount secured by these presents, and payable on demand, with interest at the rate of six per cent. per annum.

In witness whereof the parties of the first part have hereunto set their hands and seals the day and year first above written.

WALTER B. CRANE. [L. S.]
ELIZA F. CRANE. [L. S.]

Sealed and delivered in presence of—
C. M. PRESTON.
NATHAN BREWER.

Interlineations and Erasures.

The words "successors" and "the undivided three-fourths of all those tracts and parcels of land situate in the," on first page, were interlined, and the words "heirs" and "that tract or parcel of land situate in the — of" and "New York" were erased before execution; and, on third page, the words "said notes" and "or discount" and "notes" and "or discount" and "six" were interlined, and the words "sum of" and "according to the conditions of a bond this day executed and delivered by the said — to the said party of the second part" and "principal sum" and "principal" and "executors, administrators" and "seven" were erased before execution.

C. M. PRESTON.

STATE OF NEW YORK, }
County of Ulster, } ss:

Be it remembered that on this fifth day of December, in the year of our Lord one thousand eight hundred and eighty-three, before me, Jacob D. Wurts, clerk of the county of Ulster and clerk of the supreme court of the State of New York, personally appeared Charles M. Preston, with whom I am well and personally acquainted, and made oath that he saw the within-named Walter B. Crane and Eliza F. Crane, his wife, seal and as their act and deed deliver the within deed for the uses and purposes therein mentioned, and that he, with Nathan Brewer, in the presence of each other, subscribed his name as a witness of the due execution thereof.

Sworn before me this 5th day of December, 1883.

JACOB D. WURTS, *Clerk.*

STATE OF NEW YORK, }
Ulster County, } ss:

Be it remembered that on this fifth day of December, in the year one thousand eight hundred and eighty-three, before me, Jacob D. Wurts, clerk of the county of Ulster and clerk of the supreme court of the State of New York, personally appeared Walter B. Crane and Eliza F. Crane, his wife, to me personally known to be the
31 mortgagors in the within mortgage named, and acknowledged that they signed, sealed, and delivered the same as their free act and deed for the uses and purposes therein mentioned; and I, Jacob D. Wurts, do hereby certify unto all *to* whom it may concern that Eliza F. Crane, the wife of the within-named Walter B. Crane, did this day appear before me, and, upon being privately and separately examined by me, did declare that she does freely, voluntarily, and without any compulsion, dread, or fear of any person or persons whomsoever renounce, release, and forever relinquish unto the National Bank of Rondout, its successors and assigns, all her interest and estate and also all her right and claim of dower of, in, or to all and singular the premises within mentioned and released.

Given under my hand this 5th day of December, 1883.

JACOB D. WURTS,
Clerk of the County of Ulster and Clerk of the Supreme Court of the State of New York.

UNITED STATES OF AMERICA, }
State of New York. }

By Joseph B. Carr, secretary of state and custodian of the great seal thereof, it is hereby certified that Jacob D. Wurts was on the day of the date of the annexed certificate clerk of the county of Ulster and clerk of the supreme court in said State and duly authorized to grant the same; that the same is in due form and executed by the proper officer; that the seal affixed to said certificate is the seal of said county; that the signature thereto of the said clerk is in his proper handwriting and is genuine, and that full faith and credit may and ought to be given to his official acts.

In testimony whereof the great seal of the State is hereunto affixed.

Witness my hand, at the city of Albany, the 23rd day of
32 February, in the year of our Lord one thousand eight hundred and eighty-five.

JOSEPH B. CARR,
Secretary of State.

[SEAL.]

Dated December 5th, 1883.

GEORGETOWN COUNTY, *ss:*

Recorded on the twenty-seventh day of February, 1885, at 5 o'clock p. m., in Book G of Mortgages, at pages 512, 513, 514, and 515, and examined.

Fee, $2.88.

D. H. SMITH, *Clerk.*

Recorded in the office of register of mesne conveyance for Williamsburg county, S. C., this 6th of March, 1885, in Book "U," at pages 137, 138, 139, and 140.

Fee, $2.85.

H. Z. GRAHAM,
C. C. P. & G. S. & R. M. C. for Williamsburg County.

33 EXHIBIT B.

This indenture, made this second day of July, in the year of our Lord one thousand eight hundred and sixty-nine, between George North of the village of Rondout in the town. of Kingston, county of Ulster and State of New York, party of the first part and Walter B. Crane of the same place party of the second part, witnesseth, that the said party of *of* the first part in consideration of the sum of two thousand five hundred dollars to him duly paid, and by these presents does grant and convey to the said party of the second part his heirs and assigns the equal undivided fourth part of all the following-described lands, viz: One tract lying on Snow's island, containing eighteen hundred and thirty-six acres according to a resurvey and plat thereof made by William Erwin, the 27th, day of September, 1866. Another tract on which the residence of A. W. Dozier stands separated from the tract first above named, by Clark's creek and containing two thousand seven hundred and nine acres according to a resurvey and plat thereof made by William F. Erwin, the 27th day of September 1866. Also one other tract on which A. W. Dozier's summer house stands and separated from the second tract above mentioned by the public road leading from Sockee bridge, by Mrs. Stone's residence, to the old mill known as Johnson's mill, and containing one thousand and seventy-five acres, according to a resurvey and plat thereof made by William F. Erwin, 27th, day of April, 1867: the said lands having such forms, marks, buttings and boundings as on reference to said several plats will more fully and at large appear: the said three tracts constituting one united

body of land and containing in the aggregate five thousand six hundred and twenty acres, situated lying and being on the south side of Big Pee Dee river in the county of Williamsburg in the State of South Carolina and known as
Longwood plantation and being the same premises con-
34 veyed to the party of the first part by A. W. Dozier by deed bearing date the 6th day of May A. D. 1869 and recorded in the clerk's office of Williamsburg county in Book K, pages 361 & 362 on the 8th day of May A. D. 1869, subject however to a certain mortgage executed by the said George North to the said A. W. Dozier of seven thousand dollars on the purchase of the above-described property. Also one equal undivided fourth part of all that tract of land known by the general appel-ation of Britton's Ferry containing five hundred acres more or less and situated lying and being partly in Williamsburg county and partly in Georgetown county the boundaries of said tract of land described in a deed from Mary A. Eddy to C. W. Martin bearing date 10th, of August 1860, being as follows: On the north by lands of E. H. Britton; on the east by Pee Dee river; on the south by lands of L. J. White and on the west by lands of W. A. Lairamore and being the same lands and premises conveyed to the said George North by C. W. Martin, and the deed of which is recorded in the office of register mesne conveyance Georgetown S. C.—

June 5th, 1869 in Book B pages 471 & 472 with the appurtenances and all the estate title and interest therein of the said party of the first part to the extent aforesaid and the said George North does hereby covenant and agree with the said party of the second part his heirs executors administrators and assigns that he has not done committed executed or suffered any act or acts thing or things whatsoever except the mortgage aforesaid, whereby or by means whereof the above mentioned and described premises or any part or parcel thereof now are, or at any time hereafter shall or may be impeached charged or incumbered in any manner or way whatsoever.

In witness whereof the party of the first part has hereunto set his hand and seal the day and year first above written.

GEORGE C. NORTH. [SEAL.]

Sealed and delivered in presence of—
WM. LAWTON,
ABRAM DU BOIS.

35 STATE OF NEW YORK, }
Ulster County, } ss:

Be it remembered that on this — day of July, 1869, before me, Charles W. Devo, clerk of the county of Ulster and clerk of the supreme court of the State of New York, personally appeared William Lawton, with whom I am well and personally acquainted, and made oath that he saw the within-named George North seal and as his act and deed deliver the within deed for the uses and purposes therein mentioned, and that he, with Abram Du Bois, in the

presence of *such* other, subscribed his name as a witness of the due execution thereof.

Sworn before me this 13th day of July, 1869.

CHARLES W. DEYO, *Clerk.*

STATE OF NEW YORK, }
Ulster County, } *ss:*

Be it remembered that on this 13th day of July, 1869, before me, Charles W. Deyo, clerk of the county of Ulster and clerk of the supreme court of the State of New York, personally appeared George North, to me personally known to be the grantor in the within deed and conveyance named, and acknowledged that he signed and sealed and delivered the same as his free act and deed for the uses and purposses therein mentioned.

Given under my hand and seal this thirteenth day of July, A. D. one thousand eight hundred and sixty-nine.

CHARLES W. DEYO,

[SEAL.] *Clerk of the County of Ulster and Clerk of the Supreme Court of the State of New York.*

[Stamp.] [Stamp.]

36 STATE OF SOUTH CAROLINA, }
Williamsburg County. }

This is to certify unto all whom it may concern that the annexed deed of conveyance of real estate therein specified from George North, of Rondout, county of Ulster, in the State of New York, to Walter B. Crane, of the county and State aforesaid, is recorded in the register mesne conveyance department for the county and State aforesaid, in Book "L," pages 54 & 55, duly certified to by me this the third day of September, A. D. eighteen hundred and sixty-nine, and in the ninety-third year of the Independence of the United States of America.

In witness whereof I have hereunto set my hand and seal of office this the 3rd September, A. D. 1869.

[SEAL.] M. J. HIRSCH,
C. C. P. & R. M. C.

OFFICE OF REGS. MESNE CONVEYANCE,
GEORGETOWN, *Oct. 12th*, 1869.

This conveyance is duly recorded in Book B, pages 520 & 521. Examined and certified by—

C. J. COE,
C. C. P. & Reg. M. C.

Fee, $3.00.

37 EXHIBIT C.

This indenture made this twenty-eighth day of November in the year of our Lord one thousand eight hundred and seventy-one between George North of Rondout in the town. of Kingston county of Ulster and State of New York party of the first part and Edward

Tompkins of the same place party of the second part, witnesseth, that the said party of the first part, in consideration of the sum of four thousand dollars to him duly paid, hath sold, and by these presents, doth grant and convey to the said party of the second part, his heirs and assigns, all the equal undivided one-eighth part of all the following-described lands, viz: One tract lying on Snow's island containing eighteen hundred and thirty-six acres according to a resurvey and plat thereof made by William Erwin the 27th day of September, 1866. Another tract on which the former residence of A. W. Dozier stands separated from the tract first above named by Clark's creek and containing two thousand seven hundred and nine acres according to a resurvey and plat thereof made by Wm. F. Ervin the 27th day of September, 1866. Also one other tract on which the above-named A. W. Dozier's summer house stands and separated from the second tract above mentioned by the public road leading from Sockee bridge by Mrs. Stone's residence to the old mill known as Johnson's mill and containing one thousand and seventy-five acres according to a resurvey and plat thereof made by William F. Erwin 27th day of April, 1867. The said lands having such forms, marks, buttings and boundings as on reference to said several plats will more fully and at large appear. The said three tracts constituting one united body of land and containing in the aggregate five thousand six hundred and twenty acres situated lying and being on the south side of Big Pee Dee river in the county of Williamsburg in the State of South Carolina and known as Longwood plantation and being the same premises
38 conveyed to the party of the first part by A. W. Dozier by deed bearing date of sixth day of May 1869 and recorded in the clerk's office of Williamsburg county in Book K pages 361 & 362 on the 8th day of May 1869. Subject however to a certain mortgage executed by the said Geo. North to the said A. W. Dozier of seven thousand dollars on the purchase of the above-described property on which twenty-five hundred dollars and int. from May 1st 1871 remains unpaid. Also one equal undivided eighth part of all that tract of land known by the general appel-ation of Britton's Ferry containing five hundred acres more or less and situated lying and being partly in Williamsburg county and partly in Georgetown county the boundaries of said tract of land described in a deed from Mary A. Eddy to C. W. Martin bearing date 10th of August 1860 being as follows: On the north by lands of E. H. Britton, on the east by Pee Dee river, on the south by lands of L. J. White and on the west by land of W. A. Laxramore and being the same lands and premises conveyed to the said Geo. North by C. W. Martin the deed of which is recorded in the office of register mesne conveyance Georgetown S. C. June 5th 1869 in Book B pages 471 & 472 with the appurtenances and all the estate, title and interest therein of the said party of the first part to the extent aforesaid. And the said George North doth hereby covenant and agree to and with said party of the second part his heirs and assigns, that the premises thus conveyed in the quiet and peaceable possession of the said party of the second part, his heirs and assigns he will forever

warrant and defend against any person whomsoever lawfully claiming the same or any part thereof.

In witness whereof the said party of the first part hath hereunto set his hand and seal the day and year first above written.

GEORGE NORTH. [SEAL.]

Sealed & delivered in the presence of—
J. BOSTWICK.
CHAS. A. FOWLER.

[Stamp.] [Stamp.]

39 STATE OF NEW YORK, }
Ulster County. }

Be it remembered that on this twentieth day of December before me, Charles W. Deyo, clerk of the county of Ulster and clerk of the supreme court of the State of New York, personally appeared J. Bostwick, with whom I am well and personally acquainted, and made oath that he saw the within-named George North seal and as his act and deed deliver the within deed for the uses and purposes therein mentioned, and that he, with Chas. A. Fowler, in the presence of *such* other, subscribed his name as a witness of the due execution thereof.

Sworn before me this 20th day of December, 1871.

[SEAL.] CHAS. W. DEYO, *Clerk.*

STATE OF NEW YORK, }
Ulster County. }

Be it remembered that on this 20th day of December, in the year one thousand eight hundred and seventy-one, before me, Charles W. Deyo, clerk of the county of Ulster and clerk of the supreme court of the State of New York, personally appeared George North, to me personally known to be the grantor in the within deed and conveyance named, and acknowledged that he sealed and delivered the same as his free act and deed for the uses and purposes therein mentioned.

Given under my hand and seal this 20th day of December, A. D. one thousand eight hundred and seventy-one.

CHAS. W. DEYO,
Clerk of the Court *of Ulster and Clerk of the Supreme Court of the State of New York.*

On this — day of ——, in the — one thousand eight hundred and —, before me appeared —— ——, to me personally know-
40 to be the same person described in and who executed the foregoing instrument, who severally acknowledged that they executed the same; and the said —— ——, on a private examination by me apart from her said husband, acknowledged that she executed the same freely and without any fear or compulsion from her said husband.

Dated Nov. 28th, 1871, office reg. mesne conveyance, Georgetown

county, S. C. Recorded on the 20th day of January, 1872, at — o'clock — m., in Book D of Deeds, at pages 75 to 77, and examined.

C. J. COE,
Clerk & ex Off. Reg. M. C.

Reg's. fee, $2.50.

STATE OF SOUTH CAROLINA, }
Williamsburg County. }

The within deed is recorded in Book M, reg. dep. for county and State aforesaid, pages 295, 296, & 297, and duly certified to this 22nd February, 1872.

M. J. HIRSCH,
C. C. P. & R. M. C.

Fee, 2.50.

41 EXHIBIT D.

This indenture made this twenty-eight- day of November in the year of our Lord one thousand eight hundred and seventy-one between George North of Rondout in the town. of Kingston, county of Ulster and State of New York, party of the first part, and Walter B. Crane of the same place party of the second part, witnesseth, that the said party of the first part, in consideration of the sum of four thousand dollars to him duly paid, hath sold, and by these presents, doth grant and convey to the said party of the second part, his heirs and assigns, all the equal undivided one-eighth part of all the following-described lands viz., one tract lying on Snow's island containing eighteen hundred and thirty-six acres according to a resurvey and plat thereof made by Wm. Ervin the 27th day of September, 1866. Another tract on which the former residence of A. W. Dozier stands separated from the tract first above named by Clark's creek and containing two thousand seven hundred and nine acres according to a resurvey and plat thereof made by Wm. Ervin the 27th day of September, 1866. Also one other tract on which the above-named A. W. Dozier's summer house stands and separated from the second tract above mentioned by the public road leading from Sockee bridge by Mrs. Stone's residence to the old mill known as Johnson's mill and containing one thousand and seventy-five acres according to a resurvey and plat thereof made by Wm. Ervin 27th day of April 1867. The said lands having such forms marks buttings and boundings as on reference to said several plats will more fully and at large appear. The said three tracts constituting one united body of land and containing in the aggregate five thousand six hundred and twenty acres situated lying and being on the south side of Big Pee Dee river in the
42 county of Williamsburg in the State of South Carolina and known as Longwood plantation and being the same premises conveyed to the party of the first part by A. W. Dozier by deed bearing date the sixth day of May 1869 and recorded in the clerk's office of Williamsburg bounty in Book K pages 361 & 362 on the eighth day of May 1869. Subject however to a certain mortgage

executed by the said George North to the said A. W. Dozier of seven thousand dollars on the purchase of the above-described property on which twenty-five hundred dollars and interest from May 1st 1871 remains upaid.

Also one equal undivided eighth part of all that tract of land known by the general appellation of Britton's Ferry containing five hundred acres more or less and situated lying and being partly in Williamsburg county and partly in Georgetown county. The boundary of said tract of land described in a deed from Mary A. Eddy to C. W. Martin bearing date 10th of August 1860 being as follows, on the north by lands of E. H. Britton, on the east by Pee Dee river on the south by lands of L. J. White and on the west by lands of W. A. Laxramore and being the premises or same lands conveyed to the said Geo. North by C. W. Martin and the deed of which is recorded in the office of register of mesne conveyance Georgetown S. C. June 5th, 1869 in Book B pages 471 & 472.

With the appurtenances and all the estate, title and interest therein of the said party of the first part to the extent aforesaid. And the said George North doth hereby covenant and agree to and with said party of the second part his heirs and assigns, and the premises thus conveyed in the quiet and peaceable possession of the said party of the second part, his heirs and assigns he will forever warrant and defend against any person whomsoever lawfully claiming the same or any part thereof.

In witness whereof the said party of the first part hath hereunto set his hand and seal the day and year first above
43 written.

GEORGE NORTH. [SEAL.]

Sealed & delivered in the presence of—

J. BOSTWICK.
CHAS. A. FOWLER.

[Stamp.] [Stamp.]

STATE OF NEW YORK, }
Ulster County. }

Be it remembered that on this twentieth day of December, 1871, before me Charles W. Deyo, clerk of the county of Ulster and clerk of the supreme court of the State of New York, personally appeared J. Bostwick, with whom I am well and personally acquainted, and made oath that he saw the within-named George North seal and as his act and deed deliver the within deed for the uses and purposes therein mentioned, and that he, with Charles A. Fowler, in the presence of *such* other, subscribed his name as a witness of the due execution thereof.

Sworn before me this 20th day of July, 1871.

CHARLES W. DEYO, *Clerk.*

STATE OF NEW YORK, }
Ulster County. }

Be it remembered that on this 20th day of December, in the year one thousand eight hundred and seventy-one, before me, Charles Deyo, clerk of the county of Ulster and clerk of the supreme court of the State of New York, personally appeared George North, to me personally known to be the grantor in the within deed and conveyance named, and acknowledged that he signed, sealed, and delivered the same as his free act and deed.

Given under my hand and seal this 20th day of December, A. D. one thousand eight hundred and seventy-one.

[SEAL.] CHAS. W. DEYO,
Clerk of the County of Ulster and Clerk of the Supreme Court of the State of New York.

44 STATE OF NEW YORK, }
County of Ulster. }

On this — day of ——, in the year one thousand eight hundred and —, before me appeared —— ——, to me personally known to be the same person described in and who executed the same; and the said —— ——, on a private examination by me, apart from her said husband, acknowledged that she executed the same freely and without any fear or compulsion of her said husband.

Dated Nov. 28th, 1871, office regs. mesne coveyance, Georgetown, S. C.

Recorded on the 20th day of January, 1872, in Book D of Deeds, at pages 73 to 75, and examined.

C. J. COE,
Clerk & ex Off. Regs. M. C.

STATE OF SOUTH CAROLINA, }
Williamsburg County. }

This deed is recorded in reg. dep. for the county and State aforesaid, Book M, pages 293, 294, 295, and duly certified to this 22nd Feb., 1872.

Fee, $2.50.

M. J. HIRSCH, *R. M. C.*

45 EXHIBIT E.

This indenture made this second day of July in the year of our Lord one thousand eight hundred and sixty-nine, between George North of the village of Rondout in the town. of Kingston county of Ulster and State of New York, party of the first part and Edward Tompkins of the same place party of the second part, witnesseth, that the said party of the first part in consideration of the sum of two thousand five hundred dollars to him duly paid, has sold and by these presents does grant and convey to the said party of the second part his heirs and assigns the equal undivided fourth part of all the following-described lands, viz., one tract lying on Snow's island, containing eighteen hundred and thirty-six acres ac-

cording to a resurvey and plat thereof made by Wm. Ervin the 27th day of September 1866. Another tract on which the residence of A. W. Dozier stands separated from the tract above named, by Clark's creek and containing two thousand seven hundred and nine acres according to a resurvey and plat thereof made by Wm. Ervin the 27th day of September 1866. Also one other tract on which A. W. Dozier's summer house stands and separated from the second tract above mentioned by the public road leading from Sockee bridge by Mrs. Stone's residence, to the old mill known as Johnson's mill, and containing one thousand and seventy-five acres, according to a resurvey and plat made by Wm. Ervin 27th day of April 1867; the said lands having such forms marks buttings and boundings as on reference to said several plats will more fully and at large appear; the said three tracts constituting one united body of land and containing in the aggregate five thousand six hundred and twenty acres. Situated lying and being on the south side of Big Pee Dee river in the county of Williamsburg in the State of South Carolina and known as Longwood plantation and being the same premises
46 conveyed to the party of the first part by A. W. Dozier by deed bearing date the 6th day of May A. D. 1869, and recorded in the clerk's office of Williamsburg county in Book K pages 361 & 362 on the 8th day of May A. D. 1869 subject however to a certain mortgage executed by the said George North to the said A. W. Dozier of seven thousand dollars, on the purchase of the above-described property. Also one equal undivided fourth part of all that tract of land known by the general appel-ation of Britton's Ferry containing five hundred acres more or less and situated lying and being partly in Williamsburg county and partly in Georgetown county the boundaries of said tract of land described in a deed from Mary A. Eddy to C. W. Martin bearing date 10th of August 1860, being as follows: On the north by lands of E. H. Britton, on the east by Pee Dee river; on the south by lands of L. J. White, and on the west by lands of W. A. Laxramore and being the same lands and premises conveyed to the said George North by C. W. Martin and the deed of which is recorded in the office of register mesne conveyance Georgetown S. C. June 5th 1869 in Book B pages 471 & 472 with the appurtenances and all the estate title and interest therein of the said party of the first part to the extent aforesaid and the said George North does hereby covenant and agree with the said party of the second part his heirs executors administrators and assigns that he has not done, committed executed or suffered any act or acts thing or things whatsoever except the mortgage aforesaid, whereby or by means whereof the above mentioned and described premises or any part or parcel thereof now are, or at any time hereafter shall or may be impeached charged or incumbered in any manner or way whatsoever.

In witness whereof the party of the first part has hereunto set his hand and seal the day and year first above written.

GEORGE NORTH. [SEAL.]

Sealed & delivered in presence of—
WM. LAWTON.
ABRAM DU BOIS.

47 STATE OF NEW YORK, }
Ulster County. }

Be it remembered that on this — day of July, 1869, before me, Charles W. Deyo, clerk of the county of Ulster and clerk of the supreme court of the State of New York, personally appeared Wm. Lawton, with whom I am well and personally acquainted, and made oath that he saw the within-named George North seal and as his act and deed deliver the within deed for the uses and purposes therein mentioned, and that he, with Abram Du Bois, in the presence of *such* other, subscribed his name as a witness of the due execution thereof.

Sworn before me this 13th day of July, 1869.

CHARLES W. DEYO, *Clerk.*

STATE OF NEW YORK, }
County of Ulster. }

Be it remembered that on this 13th day of July, 1869, before me, Charles W. Deyo, clerk of the county of Ulster and clerk of the supreme court of the State of New York, personally appeared George North, to me personally known to be the grantor in the within deed and conveyance named, and acknowledged that he signed, sealed, and delivered the same as his free act and deed for the uses and purposes therein mentioned.

Given under my hand and seal this 13th day of July, A. D. one thousand eight hundred and sixty-nine.

[SEAL.] CHARLES W. DEYO,
Clerk of the County of Ulster and Clerk of the Supreme Court of the State of New York.

[Stamp.] [Stamp.]

48 STATE OF SOUTH CAROLINA, }
Williamsburg County. }

This is to certify unto all whom it may concern that the annexed deed of conveyance of real estate therein specified from George North, of Rondout, county of Ulster, in the State of New York, to Edward Tompkins, of the county and State aforesaid, is recorded in the register's department for the county and State aforesaid in Book "L," pages 51 & 52, and duly certified to by me this the 30th day of September, A. D. eighteen hundred and sixty-nine, and in the 93rd year of the sovereignty and Independence of the United States of America.

In witness whereof I have hereunto set my hand and seal of office this the 30th day of September, A. D. 1869.

[SEAL.] M. J. HIRSCH,
C. C. P. & R. M. C.

OFFICE REGST. MENSE CONVEYANCE,
GEORGETOWN, *Oct. 9th*, 1869.

This conveyance is duly recorded in Book B, pages 518 & 519.
Examined and certified by—

C. J. COE.
C. C. & P. Reg. M. C.

Fee, $3.00.

49 EXHIBIT F.

This indenture made this 28th day of August 1869 between David R. Smith of the village of Rondout in the town. of Kingston in the county of Ulster and State of New York party of the first part and Walter B. Crane of the same place party of the second part witnesseth as follows: Whereas the said party of the second part has lent and advanced to the party of the first part the sum of thirteen hundred and twenty-two dollars to enable him to purchase take and hold an undivided fourth of the premises hereinafter mentioned and described for which amount the said party of the first part has made executed and delivered his certain promissory note in writing bearing even date herewith to the party of the second part, and whereas the party of the second part may lend and advance to the party of the first part other and additional monies from time — hereafter and whereas it is agreed by and between the said parties that the money so lent as aforesaid as well as such as may hereafter be lent and advanced to the party of the first part by the party of the second part shall be a lien and charge upon the right and interest of the party of the first part on the land and premises hereinafter mentioned and described and the buildings and erections thereon or which shall or may hereafter be erected thereon. Now therefore in consideration of the premises and of the sum of one dollar to the party of the first part in hand paid by the party of the second part, the receipt of which is hereby acknowledged the said party of the first part does hereby grant bargain sell convey and confirm unto the said party of the second part his executors administrators and assigns all his right interest and title, in and to the following bounded and described premises viz.,
50 one tract lying on Snow's island containing eighteen hundred and thirty-six acres according to a resurvey and plat thereof made by Wm. Ervin the 27th day of September 1866. Another tract on which the residence of A. W. Dozier stands separated from the tract first above named by Clark's creek and containing two thousand seven hundred and nine acres according to a resurvey and plat thereof made by Wm. Ervin the 27th day of September 1866. Also one other tract on which A. W. Dozier's summer house stands and separated from the second tract above mentioned by the public road leading from Sockee bridge by Mrs. Stone's residence to the old mill known as Johnson's mill and containing one thousand and seventy-five acres according to a resurvey and plat thereof made by Wm. F. Ervin 27th day of April 1867, the said lands having such forms, marks buttings and boundings as on reference to said several plats will more fully and at large appear, the said three tracts constituting one united body of land and containing in the aggregate five thousand six hundred and twenty acres situated lying and being on the south side of Big Pee Dee river in the county of Williamsburg in the State of South Carolina and known as Longwood plantation and being the same premises conveyed to George North by A. W. Dozier by deed bearing date

the 6th day of May 1869 and recorded in the clerk's office of Williamsburg county in Book K, pages 361 & 362 on the 8th day of May 1869. Also one equal undivided fourth part of all that tract of land known by the general appel-ation of Britton's Ferry containing five hundred acres more or less and situated lying and being partly in Williamsburg county and partly in Georgetown county the boundaries of said tract of land described in a deed from Mary H. Eddy to C. W. Martin bearing date 10th August 1860 being as follows: On the north by lands of E. H. Britton, on the east by the Pee
51 Dee river, on the south by lands of L. J. White and on the west by lands of W. A. Laxramore and being the same lands and premises conveyed to the said George North by C. W. Martin and the deed of which is recorded in the office of register of mesne conveyance Georgetown S. C. June 5th, 1869 in Book B, pages 471 & 472. To have and to hold the above mentioned and described premises with the buildings and erections and appurtenances thereon, or which may hereafter be placed thereon, to the said party of the second part his heirs, executors administrators and assigns forever provided always and these presents are upon the express condition that if the said party of the first part his executors administrators or assigns, shall well and truly pay or cause to be paid to the party of the second part his heirs executors administrators or assigns the amount of the money lent as aforesaid with interest thereon, and all such sums of money as the party of the second part may hereafter lend or advance to the party of the first part, and all such sum or sums of money as may for any cause become due and payable to the party of the second part from the party of the first part, then this obligation to be void and of no effect, otherwise to remain in full force and virtue, but if the said party of the first part his executors administrators or assigns shall omit neglect or refuse to pay the money so lent and advanced as aforesaid or which may hereafter be lent or advanced, or the money which for any cause may become due and owing from the party of the first part his executors administrators or assigns to the party of the second part his executors administrators or assigns to enter into and upon all and singular the premises hereby granted or instructed so to be and to sell and dispose of the same and all benefit and equity of redemption of the said party of the first part his heirs executors administrators or assigns therein according
52 to law, and as the attorney for the party of the first part for that purpose by these presents duly authorized constituted and appointed to make and deliver to the purchaser or purchasers thereof a good and sufficient deed or deeds of conveyance in the law for the same in fee simple and out of the money arising from such sale to retain the amount then due to the party of the second part together with the costs charges and expenses of such sale rendering the overplus if any to the party of the first part his heirs executors administrators or assigns which sale so made shall forever be a perpetual bar both in law and equity against the said party of the first part his heirs executors administrators or assigns and all persons claiming under them or either of them.

And the party of the first part covenants and agrees to and with the party of the second part his heirs executors administrators or assigns that in case the said premises should fail on sale to bring sufficient to pay the indebtedness due to the party of the first part at the time of such sale as herein provided for that he will pay the deficiency.

In witness whereof the party of the first part has hereunto subscribed his name and affixed his seal this 28th day of August 1869.

D. R. SMITH. [SEAL.]

Sealed and delivered in the presence of—
J. BOSTWICK.
GEORGE NORTH.

53 STATE OF NEW YORK, }
Ulster County. }

Be it remembered that on the 28th day of August, before me, Charles W. Deyo, clerk of the county of Ulster and clerk of the supreme court of the State of New York, personally appeared D. R. Smith, with whom I am well and personally acquainted, and made oath that he saw the within-named David R. Smith seal and as his act and deed deliver the within mortgage for the uses and purposes therein mentioned, and that he, with Geo. North, in the presence of *such* other, subscribed his name as witness of the due execution thereof.

Sworn before me this 28th day of August, 1869.

CHARLES W. DEYO,
Clerk of Ulster Co.

STATE OF NEW YORK, }
Ulster Co. }

Be it remembered that on this 28th day of August, 1869, before me, Charles W. Deyo, clerk of the county of Ulster and clerk of the supreme court of the State of New York, personally appeared David Smith, to me personally known to be the mortgagor in the within mortgage or conveyance named, and acknowledge- that he signed, sealed, and delivered the same as his free act and deed for the uses and purposes therein mentioned.

Given under my hand and seal this 28th day of August, A. D. one thousand eight hundred and sixty-nine.

[SEAL.] CHAS. W. DEYO,
Clerk of the County of Ulster and Clerk of the Supreme Court of the State of New York.

Note given for $1,000 instead of $1,322, as named in the body of the mortgage.

54 EXHIBIT "*g*."

This indenture made this 28th day of August 1869, between David R. Smith of the village of Rondout, in the town. of Kingston in the county of Ulster and State of New York, party of the

first part and Edward Tompkins of the same place party of the second part, witnesseth as follows: Whereas, the said party of the second part has lent and advanced to the party of the first part, the sum of thirteen hundred and twenty-two dollars, to enable him to purchase, take and hold, an undivided fourth of the premises hereinafter mentioned and described for which amount the said party of the first part has made, executed and delivered his certain promissory note in writing, bearing even date herewith to the party of the second part; and whereas the party of the second part may lend and advance to the party of the first part other and additional monies from time — hereafter and whereas it is agreed by and between the said parties that the money so lent as aforesaid as well as such as may hereafter be lent and advanced to the party of the first part by the party of the second part, shall be a lien and charge upon the rights and interest of the party of the first part on the land and premises hereinafter mentioned and described and the buildings and erections thereon or which shall or may hereafter be erected thereon: Now therefore in consideration of the premises and of the sum of one dollar to the party of the first part in hand paid by the party of the second part, the receipt of which is hereby acknowledged, the said party of the first part does hereby grant, bargain, sell, convey and confirm unto the said party of the second part his executors, administrators and assigns, all his right interest and title, in and to the following bounded and described premises, viz: one tract lying on Snow's island, containing eighteen hundred and thirty-six acres according to a resurvey and plat thereof made by Wm. Ervin the 27th day of September, 1866. Another tract on which the residence of A. W. Dozier stands separated from the tract first above named by Clark's creek and containing two thousand seven hundred and nine
55 acres according to a resurvey and plat thereof made by Wm. F. Ervin, the 27th day of September, 1866. Also one other tract on which A. W. Dozier's summer house stands and separated from the second tract above mentioned by the public road leading from Sockee bridge, by Mrs. Stone's residence to the old mill known as Johnson's mill and containing one thousand and seventy-five acres, according to a resurvey and plat thereof made by Wm. F. Ervin 27th day of April, 1867, the said lands having such forms, marks, buttings and boundings as on reference to said several plats will more fully and at large appear, the said three tracts constituting one united body of land and containing in the aggregate five thousand six hundred and twenty acres, situate lying and being on the south side of Big Pee Dee river in the county of Williamsburg in the State of South Carolina and known as Longwood's plantation and being the same premises conveyed to George North by A. W. Dozier by deed bearing date the 6th day of May, 1869, and recorded in the clerk's office of Williamsburg county in Book K, pages 361 and 362, on the 8th day of May, 1869. Also one equal undivided fourth part of all that tract of land known by the general appellation of Britton's Ferry, containing five hundred acres more or less, and situate, lying and being partly in Williamsburg county

and partly in Georgetown county, the boundaries of said tract of land described in a deed from Mary H. Eddy to C. W. Martin, bearing date 10th of August, 1860, being as follows: On the north by land of E. H. Britton, on the east by Pee Dee river, on the south by lands of L. J. White and on the west by lands of W. A. Larmore and being the same lands and premises conveyed to the said George North by C. W. Martin and the deed of which is recorded in the office of register of mesne conveyances Georgetown, S. C., June 5th, 1869, in Book "B" pages 471 and 472. To have and to hold the above mentioned and described premises with the buildings and erections and appurtenances thereon, or which may hereafter be placed thereon, to the said party of the second part, his heirs, executors, administrators and assigns forever, provided always and these presents

56 are upon the express condition that if the said party of the first part, his executors, administrators or assigns, shall well and truly pay or cause to be paid to the party of the second part, his heirs, executors, administrators or assigns, the amount of the money lent as aforesaid with interest thereon, and all such sum or sums of money as the party of the second part may hereafter lend or advance to the party of the first part, and all such sum or sums of money as may for any cause become due and payable to the party of the second part, from the party of the first part, then this obligation to be void and of no effect, otherwise to remain in full force and virtue. But if the said party of the first part his executors, administrators or assigns shall omit, neglect or refuse to pay the money so lent and advanced as aforesaid or which may hereafter be lent or advanced, or the money which for any cause may become due and owing from the party of the first part, his executors, administrators or assigns, to the party of the second part, his executors, administrators or assigns, then it shall be lawful for the said party of the second part his executors, administrators or assigns, to enter into and upon all and singular the premises hereby granted or instructed so to be and to sell and dispose of the same and all benefit and equity of redemption of the said party of the first part his heirs, executors, administrators or assigns therein according to law; and as the attorney for the party of the first part for that purpose by these presents duly authorized, constituted and appointed to make and deliver to the purchaser or purchasers thereof a good and sufficient deed or deeds of conveyance in the law for the same in fee-simple and out of the money arising from such sale to retain the amount then due to the party of the second part together with the costs, charges and expenses of such sale, rendering the overplus if any, to the party of the first part, his heirs, executors, administrators or assigns, which sale so made shall forever be a perpetual bar both in law and equity against the said party of the first part *against the said party of the first part* his heirs, executors, administrators and assigns and all persons claiming under them or either of them.

57 And the party of the first part covenants and agrees to and with the party of the second part his heirs, executors, admin-

istrators and assign- that in case the said premises should fail on a sale to bring sufficient to pay the indebtedness due to the party of the first part at the time of such sale as herein provided for, that he will pay the deficiency.

In witness whereof the party of the first part has hereunto subscribed his name and affixed his seal this 28th day of August, 1869.

D. R. SMITH. [L. S.]

Sealed and delivered in the presence of—
J. BOSTWICK.
GEO. NORTH.

STATE OF NEW YORK, }
County of Ulster, } ss:

Be it remembered that on this 28th day of August, 1869, before me, Charles W. Deyo, clerk of the county of Ulster and clerk of the supreme court of the State of New York, personally appeared D. R. Smith, with whom I am well and personally acquainted, and made oath that he saw the within-named David R. Smith seal and as his act and deed deliver the within mortgage for the uses and purposes therein mentioned, and that he, with George North, in the presence of each other, subscribed his name as witness of the due execution thereof.

Sworn before me this 28th day of August, 1869.

CHARLES W. DEYO,
Clerk of Ulster County.

STATE OF NEW YORK, }
Ulster County, } ss:

Be it remembered that on this 28th day of August, 1869, before me, Charles W. Deyo, clerk of the county of Ulster and clerk of the supreme court of the State of New York, personally appeared
58 David R. Smith, to me personally known to be the mortgagor in the within mortgage or conveyance named, and acknowledged that he signed, sealed, and delivered the same as his free act and deed for the uses and purposes therein mentioned.

Given under my hand and seal this 28th day of August, A. D. one thousand eight hundred and sixty-nine.

CHARLES W. DEYO,
[SEAL.] *Clerk of the County of Ulster and Clerk of the Supreme Court of the State of New York.*

The amount, $1,322, given in accordance with the above, is $325 more than has been received to this date.

D. R. SMITH.
E. TOMPKINS.

Aug. 30th, 1869.

Above should be rec'd. $1,000.

D. R. SMITH.

Rec'd on above Oct. 3rd, 1869, $875.

D. R. SMITH.

Rec'd on above Feb. 17th, 1870, $1,600.

D. R. SMITH.

Mortgage for $1,322.00.
Dated the 28th day of Aug., 1869.

59 EXHIBIT "*h*."

Whereas, David R. Smith, George North, Walter B. Crane and Edward Tompkins, have heretofore been copartners under the firm name and style of David R. Smith & Co., and whereas the said George North has agreed to sell out, assign, transfer and set over all his rights, interest and property of every name, nature and kind soever, owned, possessed, or in anywise belonging to said firm, to the said Walter B. Crane and Edward Tompkins, for and in consideration of the sum of eight thousand dollars.

Now therefore this agreement witnesseth, that the said George North for and in consideration of the sum of eight thousand dollars, to be paid as hereinafter mentioned, has and hereby does sell, assign, transfer and set over all his right, title, claim, interest, demand, cause or causes of action of every name, nature, or kind soever, which he has in or to the aforesaid copartnership rights or property, to the said Walter B. Crane and Edward Tompkins, to have and to hold the same to them, their heirs, executors, administrators and assigns forever.

And the said Walter B. Crane and Edward Tompkins agree to assume and pay the indebtedness and liabilities of the said firm and keep and save the said North fully indemnified of and from the payment of the same or any part thereof, and to pay the aforesaid consideration as follows: viz: Two thousand five hundred dollars, with interest thereon from the 28th day of November 1871, to John R. Stebbins of Memphis, and which is to apply in satisfaction of a mortgage held by the said Stebbins on property owned by the said firm; also to assume and pay a promissory note made by said George North to said Walter B. Crane and now held by James L. Van Deusen for one thousand five hundred dollars, also a promissory note made by the said George North to his brother Zacharia M. North, for five hundred dollars and also a promissory note made by said George North to Turck & Burhans for two hundred and fourteen dollars, both of which last-mentioned notes are now past due; and to pay the residue of said purchase-money in three
60 promissory notes of equal amounts payable respectively in three, six and nine months from the date hereof, with interest.

In witness whereof the parties hereto have subscribed their names and affixed their seals in duplicate this 29th day of December, 1871.

W. B. CRANE. [L. S.]
GEORGE NORTH. [L. S.]
E. TOMPKINS. [L. S.]

Rec'd of Walter B. Crane the Zachariah M. North note of $500 and the note of Turck & Burhans, mentioned in the foregoing

agreement as part of the consideration therein mentioned, this 29th of December, 1871.

GEO. NORTH.

Rec'd of W. B. Crane my note to James L. Van Dusen for $1,500, endorsed and paid by W. B. Crane, mentioned in the foregoing agreement as part of the consideration therein mentioned, January 1st, 1872.

GEO. NORTH.

61 EXHIBIT "*i*."

RONDOUT, N. Y., *March 1st*, 1877.

For and in consideration of deed of lots Nos. 79, 80, 81, 82, 83, 84, and extending ten feet east of lot No. 84, said lots located and adjoining the easterly line of Edward Tompkins' property and residence at Poukhockie, Rondout, New York. For the said Edward Tompkins' whole and entire interest in all and every description of property now held in the name and firm of D. R. Smith & Co., located in South Carolina, with lumber and book accounts at Rondout, New York. I do hereby release the said Edward Tompkins from all debts, dues and demands owing by said firm of D. R. Smith & Co., except seven notes in the National Bank of Rondout, said notes amounting to the sum of eight thousand and six hundred ($8,600.00) dollars, which we hereby agree to have continued from one to two years if required, holding ourselves responsible for said notes as heretofore. I, W. B. Crane agree to pay said notes, indemnifying Edward Tompkins from all loss incurred from the continuation of said notes.

E. TOMPKINS. [L. S.]
W. B. CRANE. [L. S.]

Witness:
D. R. SMITH.

We do also hereby agree that the firm of D. R. Smith & Co. is hereby dissolved by mutual consent from the above date.

W. B. CRANE. [L. S.]
E. TOMPKINS. [L. S.]

62 EXHIBIT "*j*."

Volume "Q," Record of Conveyances, page 558.

E. M. Boykin
to
Thomas R. McGahan. } Conveyance.

UNITED STATES OF AMERICA, }
South Carolina District. }

To all whom these presents may concern I, E. M. Boykin, marshal of the United States for the district of South Carolina, send Greeting:

Whereas, by virtue of writs of *fieri facias* issued out of the honorable circuit court of the United States for the district aforesaid,

tested the twenty-eighth day of April in the year of our Lord one thousand eight hundred and eighty-five, and returnable according to law to me directed and lodged in my office on the twenty-eighth day of April one thousand eight hundred and eighty-five, commanding me of the goods and chattels, houses, lands, and otherehereditaments, and real estate of the firm of D. R. Smith & Company, a firm composed of D. R. Smith, and W. B. Crane, and of D. R. Smith individually, to levy the sum of fourteen hundred and forty-six $\frac{83}{100}$ dollars, debts and costs which M. Brown Sons & Company by the judgment of the said court at Charleston, lately recovered against the said D. R. Smith & Company and D. R. Smith individually, and the sum of nine thousand three hundred and ninety-seven $\frac{11}{100}$ dollars, debt and cost which Daniel C. Stelling, by the judgment of the said court at Charleston lately recovered against the said D. R. Smith & Company, a firm composed of D. R. Smith and W. B. Crane, and D. R. Smith individually. I have levied upon certain plantations or tracts of land with the buildings thereon in the district of South Carolina aforesaid, hereinafter more particularly described.

And whereas, after due and legal notice the said plantations or tract of land were on the seventh day of September 63 one thousand eight hundred and eighty-five, being the first Monday in said month between the hours of eleven in the forenoon and three o'clock in the afternoon of that day at the court-house in the town of Kingstree, openly, publicly, fairly and according to the custom and usage of vendues, by me sold for and towards satisfaction of the said judgments and executions unto Thomas R. McGahan, for the sum of thirty-eight hundred and fifty dollars, being at that price the highest and last bidder for the same.

Now know ye, that I, E. M. Boykin, marshal as aforesaid, by virtue of the said executions, levies and sales and of the statute in such cases made and provided, and for and in consideration of the said sum of thirty-eight hundred and fifty dollars to me in hand paid, or caused to be paid according to the terms of the said sale, have granted, bargained, and sold, and by these presents do grant, bargain, and sell and convey unto the said Thomas R. McGahan:

All that tract of land known by the general appellation of "Britton's Ferry" with the buildings and improvements thereon (except the steam saw-mill with engines, boilers, and all appurtenances belonging thereto, known as Smith's mills, which are not to be sold,) containing five hundred acres, more or less, and situate, lying and being partly in Williamsburg county and partly in Georgetown county, the boundaries of said tract of land described in a deed from Mary E. Eaddy to Clo Martin, bearing date 10th of August 1860, being as follows: On the north by lands of E. H. Britton, on the east by Pee Dee river, on the south by lands of L. J. White, and on the west by lands of W. H. Larramore, and being the same lands and premises conveyed to Edwin Tompkins by George North, the deed of which is recorded in the office of register of mesne conveyance Georgetown, S. C., 20th day of January 1872, in Book No. "D" of deeds, at pages 75–77.

Also, all that tract lying on Snow's island, containing eighteen hundred and thirty-six acres, according to a resurvey and plat thereof made by William Ervin the 27th day of September
64 1866; also, another tract, on which the former residence of A. W. Dozier stands, separated from the tract above named by Clark's creek, and containing two thousand seven hundred and nine (2,709) acres according to a resurvey and plat thereof made by Wm. F. Ervin the 27th day of September 1866.

Also, one other tract, on which the above-named A. W. Dozier's summer house stands, and separated from the second tract above mentioned by the public road leading from Sokee bridge by Mrs. Stone's residence to the old mill known as Johnson's mill, and containing one thousand and seventy-five (1,075) acres according to a resurvey and plat thereof made by Wm. F. Ervin, 27th day of April 1867; the said lands having such forms, marks, buttings and bounding as on reference to said several plats will more fully and at large appear.

The said three tracts constituting one united body of land, containing in the aggregate five thousand six hundred and twenty acres, situate, lying and being on the south side of Big Pee Dee river in the county of Williamsburg in the State of South Carolina and known as "Longwood plantation."

Also, all that tract of land known as the Horse Shoe Lake tract, containing six hundred and eighty-seven (687) acres more or less, and situate, lying and being in Marion county, South Carolina; the boundaries of said tract of land, described in a deed from Hugh R. Johnson to W. B. Crane, Edward Tompkins and D. R. Smith, bearing date 12th day of November, 1871, being as follows: On the north and northwest and west by lands of W. K. Martin and A. O. McDuffie, south and southeast by lands of Mrs. Sarah B. Woommey and the Great Pee Dee river, as will be shown and appear by reference to a plat thereof made by J. Ben. Johnson, deputy surveyor, on the 20th day of December 1853, said deed from Hugh R. Johnson to W. B. Crane, Edward Tompkins, and D. R. Smith, was recorded in register's office for Marion county, South Carolina, January 30th, '72, in Book E E, on pages 400, 401.

Also, all that tract of land in Georgetown county, South Carolina, received by virtue of an execution against J. M. Mat-
65 thews, and deeded to W. B. Crane, Edward Tompkins, and D. R. Smith by J. W. Lesesne, sheriff of Georgetown county, South Carolina, dated September 6th 1875, and is recorded in office of R. M. C. G. C., in Book E, page- 540, 541 and 542, February 23rd, 1876.

Together with all and singular the members and appurtenances thereunto belonging, and ass estate, title and interest which the said firm of D. R. Smith & Company and D. R. Smith individually of right had in and to the same.

To have and to hold the said premises with the appurtenances unto the said T. R. McGahan, his heirs and assigns forever.

In witness whereof I have hereunto set my hand and seal, this 7th day of September in the year of our Lord one thousand eight

hundred and eighty-five, and of the Independence of the United States of America, the one hundred and tenth.

E. M. BOYKIN, [L. S.]
United States Marshal.

Signed, sealed, and delivered in the presence of—
C. A. McHUGH.
J. E. BURKE.

THE STATE OF SOUTH CAROLINA, }
Richland County. }

Personally appeared before me J. E. Burke and made oath that he saw the within-named E. M. Boykin, U. S. marshal, sign, seal, and as his act and deed deliver the within written deed, and that he, with C. A. McHugh, witnessed the execution thereof.

J. E. BURKE.

Sworn to before me this 25th day of November, A. D. 1885.
This deed, though executed on the seventh day of September, 1885, not delivered until November 25th, 1885.

J. ANCRUM SIMONS,
Notary Public.

Recorded this 8th day of December, A. D. 1885.

H. Z. GRAHAM, *R. M. C.*

66 STATE OF SOUTH CAROLINA, }
County of Williamsburg. }

OFFICE OF CLERK OF COURT.

I, H. Z. Graham, clerk of court and register of mesne conveyance for county and State aforesaid, do hereby certify that the foregoing is a true copy of the deed recorded in my office in vol. "Q" of Conveyance Records, at pages 558, 559, 560, and 561.

Witness my hand and seal this seventh day of May, A. D. 1886, at Kingstree, S. C.

H. Z. GRAHAM,
[SEAL.] *C. C. P. & G. S.*

67 EXHIBIT "*k*."

Know all men by these presents, that I, Edward Tompkins of the city of Kingston (formerly village of Rondout) in the county of Ulster and State of New York of the first part, in consideration of the sum of thirteen hundred and twenty-two dollars, to me in hand paid by Walter B. Crane of the said city of Kingston of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, has granted, bargained, sold, assigned, transferred and set over, and by these presents does grant, bargain, sell, assign, transfer and set over unto the said party of the second part, a certain indenture of mortgage, bearing date the 28th day of August in the year one thousand eight hundred and sixty-nine, made by David R. Smith of the vil-

lage of Rondout, in the town. of Kingston, in the county of Ulster and State of New York and given me to secure the payment of the sum of $1,322.00 on certain lands lying in the State of South Carolina, mortgage not recorded at this date, and which said mortgage was recorded in the clerk's office of the county of —— on the — day of ——, in the year 18—, in Book No. — of Mortgages, at page —, &c., together with the bond or obligation therein described, and the money due or to grow due thereon, with the interest:

To have and to hold the same unto the said party of the second part, his executors, administrators or assigns, forever subject only to the provisos in the said indenture of mortgage contained: And I do hereby make, constitute and appoint the said party of the second part, my true and lawful attorney, irrevocable, in my name or otherwise, but at his own proper costs and charges, to have, use and take all lawful ways and means for the recovery of the said money and interest, and, in case of payment, to discharge the same as fully as I might or could do if these presents were not made.

In witness whereof I have hereunto set my hand and seal this 24th day of April in the year one thousand eight hundred and seventy-seven.

68 EDWARD TOMPKINS. [L. S.]

Sealed and delivered in presence of—
JOSIAH DUBOIS, JR.

STATE OF NEW YORK, }
County of Ulster, } *ss:*

On this twenty-fourth day of April, in the year one thousand eight hundred and seventy-seven, before me, the subscriber, personally came Edward Tompkins, to me known to be the person described in and who executed the within instrument, and acknowledged that he executed the same.

J. DUBOIS, JR.,
Justice of the Peace.

Dated April 24th, 1877.

69 EXHIBIT "*l.*"

THE STATE OF SOUTH CAROLINA, }
Williamsburg County. }

I acknowledge that I have received full satisfaction of the mortgage from George North to A. W. Dozier, deceased, dated the sixth day of May, A. D. 1869, and recorded in the office for recording mesne conveyances, in the county and State aforesaid, in Book K, at pages 384, 385, and 386, and of the bond it was intended to secure, from George North to said A. W. Dozier, whose executor I am, and the said George North is therefrom hereby discharged.

Witness my hand and seal hereto attached and subscribed by my lawful attorney-in-fact June 3rd, 1872.

L. F. DOZIER, [L. S.]
Ex'or of A. W. Dozier.
Per R. DOZIER. *Att'y.*

Attest:
EDW. J. PORTER.
THOS. M. GILLAND.

STATE OF SOUTH CAROLINA, }
Williamsburg County. }

Personally appeared Thomas M. Gilland and made oath that he was present and saw R. Dozier sign, seal, and as his act and deed deliver the foregoing certificate, and that he and E. J. Porter witnessed the due execution thereof.

THOS. M. GILLAND.

Sworn to before me this 4th day of June, 1872.

LOUIS JACOBS,
Trial Justice.

STATE OF SOUTH CAROLINA, }
Williamsburg County. }

The within deed is recorded in Book M, pages 434, 435,
70 reg. dep't for the county and State aforesaid, and duly certified to this 5th June, 1872.

M. J. HIRSCH,
C. C. P. & R. M. C.

71 EXHIBIT No. 3 "*a*."

Whereas, Walter B. Crane, Edward Tompkins, George North and David R. Smith, all of Rondout in the town. of Kingston, county of Ulster and State of New York having purchased in joint copartnership a plantation on the Great Pee Dee river in Williamsburg county and State of South Carolina, known as Longwood and also another plantation partly in said county of Williamsburg and partly in Georgetown —, known as Britton's Ferry, and whereas it is contemplation to erect by said parties a saw mill or mills or other machinery for manufacturing, sawing and preparing the timber for market now growing upon said plantation or otherwise obtained, and also to cultivate said plantation for the production of grain, cotton &c.

Now be it known and it is hereby agreed between the parties above named that the said D. R. Smith is to take charge of said plantations and to superintend the erection of such saw mill or mills as may be necessary and in accordance with the agreement or consent of the mutual partners, and that the said D. R. Smith is to superintend the work necessary to prepare said timber and lumber for market and the sale of the same and the business generally, necessary to conduct the plantations and lumber business, and that

the said D. R. Smith is to give his entire time and attention to said business of said firm to the best of his ability and it is hereby agreed that he shall receive for his services the sum of twelve hundred ($1,200.00) dollars per year in addition to house rent and so much of the produce of the plantation as may be necessary for his family supplies and in addition thereto it is hereby mutually agreed that upon and after paying a clean net dividend of twenty-five per cent. per annum to the mutual partners for the entire investment including purchase-money, that then one-half the remaining profits if any shall be paid to the said D. R. Smith as additional compensation for his services.

And whereas the said D. R. Smith is unable at present to advance or pay his proportion of the capital to make the purchase and
72 develop the same and whereas the said W. B. Crane and Edward Tompkins agree to advance to the said D. R. Smith the sum of five thousand ($5,000.00) dollars in equal proportions, or twenty-five hundred ($2,500.00) dollars each, from time to time as the same may be required or so much thereof as may be necessary to make purchase and develop the said property and conduct the business, said sum in no case to exceed the sum of five thousand ($5,000.00) dollars, and the above-named D. R. Smith hereby agrees to and with the above-named mutual partners that he will devote his entire time and attention to the business of the said mutual partners and that he will to the best of his ability conduct the business of said firm, both as to the care and conduct of the plantation and all the business necessary in manufacture and sale of lumber or such other business as the said partners may mutually elect to conduct, and the said D. R Smith hereby agrees to and with the said W. B. Crane and Edward Tompkins for their security for any advance made or to be made, to mortgage his undivided one-quarter of the above-named property to the said W. B. Crane and Edward Tompkins.

The business of this firm to be conducted in the name and firm of David R. Smith & Co., and it is understood by the above parties named in this contract that the above agreement is to be in full force and virtue for the term of five years from the first day of May, A. D. 1869, unless otherwise ordered and determined by the mutual consent of the parties concerned.

GEO. NORTH.
W. B. CRANE.
E. TOMPKINS.
DAVID R. SMITH.

[Stamp.]

73 EXHIBIT No. 3 "*b*."

Agreement of Copartnership.

Articles of agreement made the 30th day of August A. D. 1869, between George North, Walter B. Crane and Edward Tompkins, of Rondout, in the town. of Kingston, county of Ulster and State of New York, of the one part and David R. Smith of Longwood, Williamsburg county, South Carolina of the other part.

The said George North, W. B. Crane, Edward Tompkins and D. R. Smith have agreed and by these presents do agree to become copartners together in the purchase and cultivation of two plantations on the Great Pee Dee river in Williamsburg and Georgetown counties, South Carolina, known as Longwood and Britton's Ferry, and also in the manufacture and sale of lumber and timber now growing upon said plantations or otherwise purchased or obtained, and do hereby agree to be governed by the following articles:

Article 1st. The said business shall be carried on under the name and firm of David R. Smith & Co.

Article 2nd. Each of said partners shall furnish in cash a capital of nine thousand ($9,000.00) dollars, of which the sum of two thousand ($2,000.00) dollars shall be advanced by each partner immediately, and the remainder from time to time as the same may be required for the payment of the purchase-money of said plantations as the same shall become due and also for the purchase of mills and machinery for the manufacture of said lumber or timber as the same shall from time to time be required or for such other purposes as shall be necessary to conduct the business of said firm.

Article 3rd. David R. Smith of said firm shall give his personal attention and devote his time during reasonable hours of business wholly to the interests of the firm, and shall use his best skill, judgment and discretion in promoting the profits of the business, and during the continuance of this agreement shall engage in no
74 speculations on his own separate account or be in any way interested in any other business than that of the copartnership hereby established, without the written consent of the other partners.

Article 4th. The accounts of said partners shall be kept in regular books and every transaction shall be duly entered and vouchers as far as practicable kept of such transactions, and the said books shall at all times be open for the inspection and free use of either party.

Article 5th. Neither of said parties shall assume any pecuniary liability in the name of the firm for the accommodation of any other person without the written consent of the other parties.

Article 6th. All purchases of goods exceeding the value of one thousand ($1,000.00) dollars shall be the subject of consultation and mutual agreement by the partners.

Article 7th. Neither partner shall withdraw from the business of the concern more than his share of the profits which may have ac-

crued nor at any time until after a dividend of such profits shall have been declared.

Article 8th. An account of the joint stock and the joint liabilities shall be taken on the first day of January A. D. 1871, and the same date every year thereafter.

Article 9th. This copartnership shall continue for the term of five years from the first day of May A. D. 1869, subject however to be determined by the death of either partner, or the mutual agreement of the parties, or a violation of either of the foregoing agreements.

Article 10th. A division of the profits or losses in the business shall be equal, subject however to and in accordance with an agreement made with D. R. Smith, one of the partners of said firm, bearing date May 1st 1869.

Article 11th. D. R. Smith being the active and resident partner shall transmit monthly statements of the affairs of the firm to the other partners, and is hereby authorized to use and sign the name of the firm in all transactions necessary to conduct the business of said copartnership.

75 Article 12th. For the purpose of securing the performance of the aforesaid agreements, it is agreed that either party, in case of any violation of them or either of them, by the other, shall have the right to dissolve the copartnership forthwith ; and if the fact of such violation having taken place, be disputed by the party accused, it shall be left to the decision of three disinterested persons, of whom each party is to choose one person, and these two, a third one, and the decision of a majority of these three shall be conclusive.

In witness whereof, we have hereunto interchangeably set our hands and seals the day and year first above written.

GEO. NORTH.
W. B. CRANE.
E. TOMPKINS.
D. R. SMITH.

OCTOBER 1ST, 1874.

W. B. Crane and Edward Tompkins having purchased the entire interest of Geo. North in the above business, we, the undersigned, hereby agree to continue the same business so long as mutually satisfactory (either of the parties reserving the right to dissolve the copartnership by giving three months' notice), the business to be continued same as above, with the exception of paying D. R. Smith one-half the net profits in excess of 16 % instead of 25 % on the original investment ($32,000).

W. B. CRANE.
E. TOMPKINS.
D. R. SMITH.

MARCH 1ST, 1877.

Edward Tompkins having this day disposed of his interest to W. B. Crane in the above agreement, W. B. Crane and D. R. Smith

hereby agree to continue the business, as per enclosed agree-
76 ment, until April 1st, 1878.

W. B. CRANE.
D. R. SMITH.

77 EXHIBIT No. 4 "*a*."

SMITH'S MILLS,
SOUTH CAROLINA, *Sept. 3rd*, 1885.

W. B. Crane, Esq., Rondout, N. Y.

DEAR SIR: Yours of 28th Aug. duly rec'd. The property will undoubtedly be bid in by the creditors same as the other was. If so they will insure it. There is no use of our having it insured, as the policies would be again cancelled as soon as ownership was changed. I could have made any reasonable arrangement with creditors here before the bank mortgage was known, but now cannot. The sale will be subject to the bank mortgage, as I suppose they are acting in concert with the bank. The creditors here were all disposed to help us, but the preference to bank killed it. Some part of the mill has been running since the sale, so that there has at all times been hands there and proper guard taken against fire. I will be present at the sale at Kingstree, Monday, and will advise you of the result.

Yours very truly, D. R. SMITH.

78 EXHIBIT No. 4 "*b*."

SMITH'S MILLS,
SOUTH CAROLINA, *Sept. 11th*, 1885.

W. B. Crane, Esq., Rondout, N. Y.

DEAR SIR: Yours of 4th rec'd Wednesday eve. I was present at the sale on the 7th. Mr. Hirsch promised to write you same p. m., giving you account of sale, as I wished to make home same day.

Mill	tract was bid in for.....		$1,200 00
Longwood	" "		1,500 00
Horse Shoe Lake	" "		700 00
Jahaney Island	" "		450 00
			$3,850 00

All was bid in by creditors in name of T. R. McGahan. E. P. Smith's lease will continue and business run along, under my management, for E. P. Smith. I will take a run on North after a little and will see you when there.

I note Herbert expected to start for home, which I suppose is S. C. I have not heard of his arrival yet; supposed when he left here he was going to Colorado. I think of nothing particular to add.

Yours very truly, D. R. SMITH.

79 And on the 8th day of September, 1890, came into court the complainant, by its solicitors, and filed the following notice:

Notice.

THE UNITED STATES OF AMERICA, }
District of South Carolina, Fourth Circuit. }

In the Circuit Court.

THE NATIONAL BANK OF RONDOUT, a National Banking Association under the Acts of Congress, in the State of New York, }
vs.
THOMAS R. MCGAHAN, ELIZABETH P. SMITH, Wife of D. R. Smith, & D. R. SMITH. }

To J. N. Nathans, Esqr., and Samuel Lord, Esqr., defendants' solicitors:

Please take notice that on the affidavit, a copy of which is herewith served, and on all the pleadings and proceedings in this cause, the undersigned will move before J. E. Hagood, Esqr., clerk of the circuit court of the fourth circuit for the district of South Carolina, on the 19th day of September, at ten (10) o'clock a. m., at the office of said clerk in Charleston, to grant a commission in this action, to issue from said court, under the seal thereof, to a commissioner or commissioners to be appointed by said court, empowering him to take the testimony of Jansen Hasbrouk, of Rondout, New York, said witness to be examined at Rondout, in the State of New York, on behalf of complainant herein, upon interrogatories to be
80 annexed to said commission, a copy of which interrogatories are herewith served upon you, and in which defendants are at liberty to join. We nominate Mr. Alvah S. Newcomb, of Kingston, New York, as our commissioner, and unless you submit the names of your commissioners at time and place above mentioned we will submit the names of such other persons as may be necessary or proper.

BARKER, GILLILAND & FITZSIMONS,
Complainant's Solicitors.

THE STATE OF SOUTH CAROLINA, }
County of Charleston, } *ss:*

Personally appeared before me W. Huger Fitzsimons, who on oath says that he is one of the attorneys for complainant in the above-entitled action; that issue of fact was joined therein by the service of answers of defendant; that complainant has, as deponent verily believes, fully and fairly disclosed to this deponent the facts which it expects to prove by the witness hereinafter named; that deponent believes from such statements that complainant has a good and substantial cause of action upon the merits, and that said witness, to wit, Jansen Hasbrouk, residing at Rondout, in the State of New York, is a material and necessary witness for complainant upon the trial of this action.

That said witness resides outside of the jurisdiction of this court and resides at Rondout, in the State of New York, and is so infirm as to render it probable that he could not attend as a witness on the trial herein, and deponent believes that a commission to take the testimony of said Jansen Hasbrouk should issue to prevent a failure or delay of justice.

W. HUGER FITZSIMONS.

Sworn to before me this 8th day of September, A. D. 1890.

D. B. GILLILAND,
[SEAL.] *Notary Public, S. C.*

Filed 8th September, 1890.

81 *Commission to Examine Witness.*

THE UNITED STATES OF AMERICA, }
South Carolina District. }

The President of the United States of America to Alvah S. Newcomb and James A. Betts, Esquires, Kingston, Ulster county, New York, Greeting:

Whereas, a certain cause is now depending in the circuit court of the United States for the fourth circuit in the district of South Carolina, entitled "The National Bank of Rondout, a national banking association under the acts of Congress in the State of New York, plaintiff, *versus* Thomas R. McGahan, Elizabeth P. Smith, wife of D. R. Smith, and D. R. Smith, all citizens of the State of South Carolina, defendants, and it being necessary to the investigation of the said cause, that certain persons resident in Rondout, in the State of New York, should be examined on certain interrogatories; now know ye, that in confidence of your prudence, ability, and integrity, you are appointed, and by these presents, full power and authority are given to you, or any two or more of you, to examine all witnesses whatsoever, as well on the part of the said complainant as on the part of the said defendants or either of them, upon interrogatories; and therefore you, or any two or more of you, are hereby authorized and required on certain days, and at certain places, to be appointed by you for that purpose, to cause such witnesses to come before you; and then and there to examine each of them apart on the said interrogatories, on their respective corporal oaths, first taken, before you, or any two or more of you, and to reduce their depositions to writing, and return this writ to the judges of the said court at Charleston, in the State of South Carolina, under your seals, with the said interrogatories and depositions annexed; and you, and every of you, are hereby further required, that before you proceed to swear and examine any witnesses, you severally take the oath, first specified in the schedule, hereunto annexed; and any one of you is hereby authorized and empowered to administer such oath to the other, or others of you. And you are hereby further authorized and required, jointly or separately,

to administer the oath last specified in the said schedule hereunto annexed, to any clerk employed in taking the deposition of witnesses aforesaid, before such clerk is permitted to act or be present at such examination.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States of America, at Charleston, in South Carolina, district aforesaid, the nineteenth day of September in the year of our Lord one thousand eight hundred and ninety, and in the 115th year of the sovereignity and Independence of the United States of America.

[SEAL.]

J. E. HAGOOD,
C. C. C. U. S., Dist. S. C.

82 You shall, according to the best of your knowledge, truly, faithfully, and without partiality to any or either of the parties in this cause, take the examination and deposition of all and every witness and witnesses, produced and examined, by virtue of the commission hereunto annexed, upon the interrogatories now produced and left with you; and you shall not publish, disclose, or make known to any person or persons whatsoever, except the clerk or clerks by you employed, and sworn to secrecy in the execution of this commission, the contents of all, or any, of the depositions of the witnesses, or any of them, to be taken by you and the other commissioners, in the commission named, or any of them, by virtue of the said commission, until publication shall pass by rule or order of the circuit court of the United States, so help you God.

JAMES A. BETTS.

Subscribed and sworn to before me this seventh day of October, 1890.

ALVAH S. NEWCOMB,
Commissioner.

ALVAH S. NEWCOMB.

Subscribed and sworn to before me this seventh day of October, 1890.

JAMES A. BETTS,
Commissioner.

Clerk's Oath.

You shall truly, faithfully, and without partiality to any or either of the parties in this cause, take, and write down, transcribe and engross, the depositions of all and every witness and witnesses, produced before and examined by the commissioners, or any of them, named in the commission hereunto annexed, as far forth as you are directed and employed by the said commissioners, or any of them, to take, and write down, and engross, the said depositions, or any of them; and you shall not publish, disclose, or make known to any person or persons whatsoever, the contents of all or any of the depositions of the witnesses, or any of them, to be taken or written down, transcribed, or engrossed by you, or whereto you

shall have recourse, or be any ways privy, until publication shall pass by rule or order of the circuit court of the United States, so help you God.

Instructions for the Commissioners.

The commissioners are requested in the first place, to observe carefully the directions contained in the body of the commission. Any two of them will be sufficient to take the examination. Notice is to be given to the commissioners on the other side, of the time and place of examination, and if they do not attend, the examination may proceed in their absence.

When the examination of the witness is completed, his depositions are to be signed by him and attested by the commissioners.

When the examination of all the witnesses is closed, the interrogatories and depositions are to be annexed to the commission, and the whole enclosed in a large paper under seal. The commissioners will endorse on one corner of the outside of it the name of the cause, and seal the packet with their seals, and write their names across the seals, and direct it to the clerk or register, by whom the commission is signed.

If the commission is returned by post, one of the commissioners will sign a memorandum on the outside to certify that the enclosed was lodged by him in the post-office.

83 And on the 8th day of September, 1890, came into court the complainant, by its solicitors, and filed the following direct interrogatories:

Direct Interrogatories.

THE UNITED STATES OF AMERICA,)
District of South Carolina, Fourth Circuit.)

In the Circuit Court.

THE NATIONAL BANK OF RONDOUT, a National Banking Association under the Acts of Congress, in the State of New York, Rondout, New York,

vs.

THOMAS R. MCGAHAN, ELIZABETH P. SMITH, Wife of D. R. Smith, and D. R. Smith, All of Them Citizens of the State of South Carolina.

The undersigned, the commissioners duly appointed by the above-named court in the above-entitled action by annexed commission to execute said commission and to examine the person therein designated upon the interrogatories therein propounded, do respectfully report as follows to said court:

On the 7th day of October, 1890, the undersigned met at the banking-rooms of the National Bank of Rondout, at Rondout, N. Y., in the private room of the president of said bank, and having taken

before each other the oath of office hereto annexed, proceeded with the duties of such commission.

Mr. Jansen Hasbrouck, the witness to whom the annexed interrogatories were to be propounded by said commissioners, being too ill to attend before said commissioners, the matter was adjourned to October 9th, 1890, at 10 a. m., at same place.

84 October 9th, 1890, at 10 a. m.—Commissioners met at same place. Mr. Jansen Hasbrouck appeared and *after* being duly sworn by Alvah S. Newcomb, one of said commissioners, made answers to the said interrogatories which are hereto annexed.

At the close of the answer to the 27th interrogatory the commission again adjourned to October 11th, 1890, at 10 a. m., at same place.

October 11th, 1890, at 10 a. m.—Commissioners met at same place. Mr. Jansen Hasbrouck appeared before said commissioners and under oath made answers to the remainder of said interrogatories and the cross-interrogatories, which answers are hereto annexed. At the end of said answers said Jansen Hasbrouck signed his name, and again swore to said answers before both of said commissioners.

At all of the proceedings above set forth and during the examination of Mr. Hasbrouck no one was present except your commissioners and Mr. Hasbrouck.

Dated at Kingston, N. Y., October 15th, 1890.

ALVAH S. NEWCOMB,
JAMES A. BETTS,
Commissioners.

Interrogatories to be Propounded to Jansen Hasbrouck, a Witness Residing at Rondout, in the State of New York.

Commissioners meet at the National Bank of Rondout, at 10 a. m., October 9th, 1890.

JANSEN HASBROUCK, of Rondout, in the city of Kingston, in the county of Ulster and State of New York, being duly sworn by Alvah S. Newcomb, commissioner, made the following answers to the interrogatories propounded to him in the above-entitled action:

Q. What is your name, age, occupation, and place of residence?

A. Jansen Hasbrouck; age, little over 80 years; occupa-
85 tion at present, nothing; retired banker; residence, Rondout, in the city of Kingston, Ulster county, New York.

Q. If in answer to the first interrogatory you say that you now reside in Rondout, in the State of New York, state how long you have there resided.

A. I was born in Rondout and have lived there about 80 years.

Q. During your residence at Rondout, what has been your business, occupation?

A. Merchant and in freighting business, and for about 37 years president of the National Bank of Rondout.

Q. Have you during your residence at Rondout had any knowledge of the banking institution known as the National Bank of Rondout, Rondout, N. Y.?

A. Yes, sir.

Q. During the period of time over which your knowledge of the Bank of Rondout extends, who were the officers of the bank?

A. I was president for 37 years, General George H. Sharpe president for 3 years, and Abram Hasbrouck, my son, is president now. Henry H. Reynolds was first cashier for about three years. Then John S. Longworthy was cashier for about two years. Then Edgar B. Newkirk was cashier about 28 or 29 years, and now John B. Alliger is the cashier. The first vice-president was Jacob Burhans, for about three years. The next vice-president was Abram G. Hardenbugh, about 2 years, until his death. The next vice-president was Walter B. Crane, for about twenty-five years, who was succeeded by George H. Sharpe, who was vice-president for about six months. The next vice-president was my son, Abram Hasbrouck. There is no vice-president now. I have been connected with the bank since it was organized and was one of the organizers of the bank and was the first president.

Q. If in answer to the 5th interrogatory you say that you was the president of the bank, state the time when you became
86 president and the years during which you continued to be president.

A. I was made president in 1848, when the bank was organized, and was president of the bank until I resigned, in July, 1885.

Q. If in answer to the 5th interrogatory you say that Walter B. Crane was vice-president of the Bank of Rondout, state during what time he was such.

A. Walter B. Crane was vice-president of the bank from 1853 until January, 1885.

Q. In what other relation than that of vice-president of the Bank of Rondout did you know Walter B. Crane?

A. In no other relation, except as a customer of the bank—a depositor at first and a borrower afterward.

Q. When did you first know Walter B. Crane in Rondout?

A. I first knew Walter B. Crane in Rondout in about 1835 or 1836.

Q. In what business was Walter B. Crane engaged while you knew him in Rondout?

A. At first he was a blacksmith; next he was engaged in lumber and mercantile business with Charles McEnter; then and for a number of years he was an employee of the Delaware and Hudson Canal Company; afterward he had a lumber yard and received and sold shipments of lumber from South Carolina.

Q. If you say that Walter B. Crane conducted a lumber business in Rondout, state the years during which he conducted such business there.

A. I cannot state with accuracy the years in which he was en-

gaged in the lumber business. He was engaged in this business several years.

Q. Was any other person or were any other persons associated in such business with Walter B. Crane? If yea, name such person or persons.

A. Yea; D. R. Smith, under the firm name and style of D. R. Smith and Company.

Q. Did Walter B. Crane or any persons or copartnership
87 with whom or in which he was associated have any business dealings with the Bank of Rondout? If yea, state of what nature generally were such dealings.

A. Yea; the bank discounted notes and drafts for the firm of D. R. Smith and Company.

Q. With what officer of the bank were such dealings carried on by said Walter B. Crane or the person or persons with whom he was associated?

A. Such dealings were carried on with the president of the bank.

Q. If you say that Walter B. Crane was a member of the firm of D. R. Smith & Co., state what was the business of the copartnership of D. R. Smith & Co. and who were the members of said firm in April, 1880, and thereafter during your knowledge of it.

A. Yea; principally getting out lumber in South Carolina, as I understood it. The members of the firm, as I understood it, in April, 1880, were Walter B. Crane and David R. Smith. The same parties constituted the firm thereafter, so far as I know.

Q. If you say that D. R. Smith & Co. had an account current of money transactions or of deposits or loans or discounts or of debits and credits of cash with the Bank of Rondout, state the period covered by such account current.

A. Yea, the account current of D. R. Smith and Company with the bank commenced September 22nd, 1879, and continued until July 3rd, 1885, the date of the last entry on the ledger.

Q. If you say that D. R. Smith & Co.'s account covered the period between April 1st, 1880, and April, 1885, or any lesser period, append to your deposition in answer to these interrogatories a statement of such account taken from the books of the bank and compared by you.

A. I have caused a copy of the ledger account of the transactions of said D. R. Smith and Company with the bank to be made in three separate books, numbered respectively "743 L," "766 L," and "680 M" and numbered and signed by the commissioners "A," "B," & "C," which are appended hereto.

88 Q. If you say that during the period covered by such account D. R. Smith & Co. negotiated loans and discounts with the Bank of Rondout, state whether any such loans were negotiated by or on behalf of said firm with you as president of said bank.

A. Yes; such loans and discou*nts* were negotiated on behalf of said firm with me as president of said bank.

Q. State what person or persons acting for D. R. Smith & Co. negotiated such loans or discounts with you as president of the bank.

A. Walter B. Crane.

Q. If in answer to the 19th interrogatory you say that Walter B. Crane, on behalf of D. R. Smith & Co., negotiated such loans or discounts with the bank, state upon what paper such loans or discounts were made.

A. Such loans and discounts were originally a few notes; afterwards drafts made by D. R. Smith & Co. upon Walter B. Crane, treasurer.

Q. If you say that such loans or discounts were made upon notes of D. R. Smith & Co., state what became of the money so loaned or of the cash proceeds of the notes discounted.

A. The money so loaned—the proceeds of such notes and drafts—was deposited in said bank to the credit of said D. R. Smith & Co. and drawn out of said bank by said company.

Q. At what periods of time after their dates were such notes usually drawn payable?

A. The notes and drafts were most of them at three months.

Q. Were any of said notes at any time renewed: if yea, how often and at what dates?

A. All of notes and drafts were renewed and were merged into four notes of three thousand dollars, which were regularly renewed at their maturity. I cannot give the exact number of times said notes were renewed or the dates of such renewals, but the books attached to this deposition show such dates and renewals.

Q. During what period of time were such loans or discounts continued by D. R. Smith & Co. with the bank?

A. Such loans and discounts were continued from the open-
89 ing of the account in September, 1879, until it was closed, in July, 1885.

Q. Do you know D. R. Smith, of Smith's Mills, South Carolina: if yea, in what way or in what relation was he known to you?

A. Yea: I know him slightly. Originally he was a clerk in a store in Rondout with George North: then he went South, I think, in the war, and the next I knew of him he was in the lumber and real-estate business in South Carolina. I had no business relations with him except with Walter B. Crane as a member of the firm of D. R. Smith and Company.

Q. If you say that you were president of the bank in 1883, state what you know of a mortgage being given in November, 1883, by Walter B. Crane to the National Bank of Rondout as security for the payment of promissory notes of D. R. Smith & Co.

A. After the notes had run longer than the bank thought they ought to run and so long that we began to feel that they were not so secure as they ought to be, I spoke to Mr. Crane about making a mortgage to secure the bank on the property of D. R. Smith & Co. in South Carolina. He then told me that he would see Mr. Smith and talk to him about the matter. Mr. Smith afterward came to Rondout and I saw him at the bank. Mr. Smith and I had a conversation upon the subject of giving the bank a mortgage as collateral security for these notes. He protested on the ground, as he said, that it would injure their credit in South Carolina. I urged the necessity to the bank of their giving such a mortgage. He told me

that he was going East and on his way back to South Carolina he would stop here and see me. He did not stop, or at any rate he did not see me. I then spoke to Mr. Crane and told him that it was time for us to do something, as Mr. Smith didn't seem disposed to do anything, and I asked him (Mr. Crane) to give us a mortgage on his share of the property. Mr. Crane told me that he owned three-fourths of the property. He then gave the bank a mortgage upon his share of the property, dated on or about November, 1883, and requested the bank not to have the mortgage recorded at first. Afterward he said he had conferred with Mr. Smith;
90 we then sent the mortgage down and had it recorded. We held the mortgage between one and two years before it was recorded.

Q. If in answer to the 26th interrogatory you say that you as president of the Bank of Rondout required of Walter B. Crane the execution of the mortgage referred to, state whether you dealt in the matter with Walter B. Crane individually or with him officially as vice-president of the Bank of Rondout; also state whether you as president required him to give the mortgage.

A. Yea; I dealt with Walter B. Crane individually. I as president of the bank required him to give the mortgage.

Examination adjourned to October 11th, 1890, at 10 a. m., at same place.

OCTOBER 11TH, 1890.

Examination continued:

Q. State whether in any part, and, if yea, in what part, of the transactions between the Bank of Rondout and D. R. Smith & Co or Walter B. Crane said Walter B. Crane represented the bank as its vice-president or agent.

A. In no part of these transactions between D. R. Smith & Co. and the bank did Walter B. Crane represent the bank as its vice-president or agent.

Q. In requiring from Walter B. Crane the execution of the mortgage security in November, 1883, did you as president enquire into the title or ownership of the property mortgaged?

A. I did.

Q. Did you as president of the Bank of Rondout have access to the deeds conveying to Walter B. Crane the property described in the mortgage?

A. I did not.

Q. Outside of the mortgage and of those deeds, did you, at the time of the delivery of the mortgage by Crane to the bank or at any other time, have notice of any title or interest other than
91 that named in the mortgage?

A. I did not.

Q. If in answer to the 25th interrogatory you say that you know D. R. Smith, of Smith's Mills, South Carolina, personally, state whether you have ever seen him in Rondout, New York. If so, how often and at what times?

A. Yea; I have seen him twice or three times at Rondout. One

of the times was a short time before the giving of the mortgage to the bank by Mr. Crane. The other times I do not remember the dates.

Q. What was the business relation, if any, existing in April, 1880, and prior to that date and between that date and April, 1885, between D. R. Smith and Walter B. Crane?

A. I understood they were partners.

Q. If you say that D. R. Smith, at any time between April 1, 1880, and April, 1885, was in Rondout, state whether any business communication was had with him by you as president of the bank. If so, to what subject of business did such communication refer?

A. There was a business communication between Smith and myself as president of the bank. The communication was concerning the giving of a mortgage by D. R. Smith & Co. to the bank.

Q. If you say, in answer to the 27th or any other interrogatories, that the mortgage of W. B. Crane in November, 1883, was required by you, as president of the Bank of Rondout, as the condition of farther extension by the bank of the indebtedness of D. R. Smith & Co., state whether or not D. R. Smith had knowledge of the fact that the mortgage was given by Crane under such requirement or in compliance with such condition.

A. I cannot say of my own knowledge whether he did or not.

Q. Did D. R. Smith at that time object to the mortgage being given by W. B. Crane? Did the bank receive, prior to the present suit, notice from D. R. Smith of any objection on his part to the mortgage being given by Crane?

92 A. He objected to a mortgage being given by D. R. Smith & Co. upon the ground that it would injure the credit of the company in South Carolina. The bank received no notice prior to the present suit of any objection on the part of D. R. Smith to the mortgage being given by Walter B. Crane to the bank.

Q. While you were president of the bank was any notice received by the bank from D. R. Smith that he claimed the three-fourths interest of Walter B. Crane in the property described in the mortgage as copartnership property?

A. No.

Q. If you know any other fact which would benefit the complainant in this issue, state the same fully as if you had been especially interrogated thereto.

A. The business of these loans and discounts with D. R. Smith & Co. was done in regular form with me as the president of the bank and as part of our usual and ordinary business. The drafts and notes of D. R. Smith & Co. were all endorsed by Mr. Crane. I was informed by Mr. Crane that he owned personally three-fourths of the real estate belonging to him and D. R. Smith.

BARKER, GILLILAND & FITZSIMONS,
Complainant's Solicitors.

Complainant names Alvah S. Newcomb, of Kingston, Ulster county, New York, as commissioner to take above.

Cross-interrogatories for Jansen Hasbrouck, of Rondout, New York.

Q. If you say that Walter B. Crane was vice-president of the Bank of Rondout, state what are the duties of the vice-president under your by-laws, and set out the by-law in full. Did not Crane act as president during a part of the time these transactions lasted?

A. The duties of the vice-president were to act in the place
93 of the president in case of his absence, incapacity, or resignation. Section 5th of the by-laws of the bank is as follows: ".The president shall hold his office (unless he shall resign or become disqualified or be removed) for the current year for which the board, of which he shall be a member, was elected. In case of a vacancy in the office of president it shall be filled by the vice-president for the current year, and who shall then be considered an officer of the bank."

Walter B. Crane never at any time acted as president of the bank. He took no part in said transactions representing the bank.

Q. If you say in answer to the direct interrogatories that you were the officer with whom the dealings between the firm of D. R. Smith & Co. and your bank were carried on, state whether, when you gave credit to D. R. Smith & Co., or during the course of the transactions between your bank and the firm, you were informed or ascertained in any way of what the partnership assets consisted. What information did you obtain, and from whom? Did you not ascertain that they consisted partly of real estate; and, if yea, what real estate; and of personalty, of what personalty? Did you not know that the business of the firm in South Carolina was cutting down timber, preparing it for market, and shipping it? Did you not know that this land mortgaged to you was in possession of the firm and used by them in their business? Did you not know that it constituted a part of the partnership assets?

A. I was informed the partnership assets were land, wood, timber, saw-mill, and machinery. I obtained the most of it from Walter B. Crane, and also from admissions of D. R. Smith, in the conversation I had with him at the bank. I ascertained that such assets consisted partly of real estate. The real estate consisted of farming lands, wood lands, saw-mill, and machinery; the personal property consisted of cut wood, lumber, tools, and machinery.
94 I knew the business of the firm in South Carolina was partly cutting down timber, preparing it for market, and shipping it. I supposed the land mortgaged to the bank, from information I had, was in possession of the firm and used in their business. I supposed it constituted part of the partnership assets.

Q. Explain why the mortgage given by Crane, though executed on 30th November, 1883, was not recorded in Georgetown before 27th February, 1885, and not recorded in Williamsburg before the 6th March, 1885. Was there not some agreement between the bank or its officers in pursuance of which this mortgage was withheld from record during this period? If yea, state what the agreement

was. Was there not an agreement that the mortgage should not be recorded until the bank had reason to apprehend the insolvency of D. R. Smith & Co. or until such time as D. R. Crane might direct or advise that it should be recorded? Was it not withheld from record at the request of W. B. Crane? Was it not withheld from record because it was feared that the recording of it would impair the financial reputation of D. R. Smith & Co. and prevent their obtaining the credit they needed to carry on their business? Why was this mortgage recorded in 1885? Upon what information, upon whose suggestion and advice? Was it not at the suggestion of W. B. Crane? If not, at whose suggestion?

A. The mortgage was held unrecorded at the request of Mr. Crane. It was intended that both mortgages should be filed at the same time, but there was some delay about one. Yes, the agreement was that the mortgage should be held at Mr. Crane's request and on his account, and he was to notify the bank when the mortgage should be recorded. There was no agreement that the mortgage should not be recorded until the bank had reason to apprehend the insolvency of D. R. Smith & Co. The mortgage was to be held until Mr. Crane gave us due notice to have it recorded. It was withheld from record at the request of W. B. Crane. Perhaps the main part of withholding it from record was because it was feared the recording of it would impair the financial reputation of D.
95 R. Smith & Co. We did not want to injure their credit if we could help it. The reason the mortgage was recorded in 1885 was that we received a notice from Mr. Crane that it might be recorded; nothing more than this. I urged upon Mr. Crane the necessity of having the mortgage recorded, and he finally consented. It was recorded in 1885 upon Mr. Crane's consent and by solicitation. We had repeated conversations upon the subject, in which I urged that the mortgage ought to be recorded. It was at the suggestion of W. B. Crane and myself, by his giving his consent to have it recorded.

JANSEN HASBROUCK.

Subscribed and sworn to before *me* this 11th day of October, 1890.

ALVAH S. NEWCOMB,
Commissioner.
JAMES A. BETTS,
Commissioner.

We nominate James A. Betts, of Kingston, as our commissioner.

J. N. NATHANS,
SAMUEL LORD,
Defendants' Solicitors.

It is agreed by the solicitors in this cause that the bank books put in evidence and attached to the deposition of Jansen Hasbrouck shall be omitted from the record.

96 *Trial of Cause.*

THE UNITED STATES OF AMERICA,
District of South Carolina, Fourth Circuit.

In the Circuit Court. Equity.

THE NATIONAL BANK OF RONDOUT, NEW YORK, Complainant,
vs.
THOMAS R. MCGAHAN and ELIZABETH P. SMITH *et al.*, Defendants.

And at the November term of said court, begun and holden at Columbia, in the district aforesaid, on the 2nd day of December, 1890, this cause came up for hearing before the Honorable Hugh L. Bond, circuit judge; the pleadings were read to the court, and after hearing arguments by Mr. Barker, for complainant, and by Mr. Nathans and Mr. Lord, for defendants, and by Mr. Barker, in reply, the court took the case under advisement.

And on the 25th day of February, 1891, the following decree was filed.

Decree.

97 UNITED STATES OF AMERICA,
District of South Carolina.

In the Circuit Court, Fourth Circuit, November Term.

THE NATIONAL BANK OF RONDOUT, Rondout, N. Y.,
vs.
THOMAS R. MCGAHAN, D. R. SMITH, and E. P. SMITH. } Decree.

The bill of complaint in this case seeks the sale of one undivided three-fourths interest in certain real estate, with the improvements and appurtenances thereto belonging, lying partly in the county of Williamsburg, State of South Carolina, known generally as Smith's Mills and Longwood plantation, and partly in the counties of Georgetown and Marion, in said State. The property is particularly described in the bill. This undivided three-fourths was owned, as appears by the evidence reported by G. W. Dingle, referee, by Walter B. Crane in his lifetime, who, on the — day of November, 1883, executed and delivered a mortgage of same to the complainant, The National Bank of Rondout, Rondout, N. Y., to secure the payment of four certain promissory notes, amounting in the aggregate to twelve thousand dollars, or the renewal or renewals of them or either or any of them, together with the lawful discount or interest thereon, said notes being made by David R. Smith and Walter B. Crane and Henry M. Crane, under the firm name of D. R. Smith & Co., and endorsed by Walter B. Crane and Henry M. Crane, and payable at the National Bank of Rondout. The notes are more particularly described in the mortgage.

This mortgage was held by the National Bank of Rondout in its possession and was, at the request of Walter B. Crane, one of the

copartners, withheld from registry in South Carolina from the date of its delivery, in November, 1883, until the 17th day of February, 1885, when it was duly recorded in the office of the clerk of the court of common pleas of Georgetown county, South Carolina, and the 6th day of March, 1885, when it was recorded in the office of register of mesne conveyances for Williamsburg county, in said State. The notes recited in the mortgage were not
98 paid at maturity and were from time to time renewed until the 6th, 17th, and 20th days of June and the 3rd day of July, 1885, respectively, when for the last time they were renewed, each being made payable three months after the date thereof, at the expiration of which times of payment they each became due and since said dates have remained unpaid.

The records of this court show that a suit was instituted in the circuit court, at law, upon said notes by the National Bank of Rondout, N. Y. (the complainant here), against D. R. Smith, as surviving copartner of D. R. Smith & Company, and judgment recovered thereon on the 15th day of December, A. D. 1887, for the sum of thirteen thousand eight hundred and forty-four $\frac{14}{100}$ dollars, to which sum, with interest from said date, the complainant is now entitled, and which judgment remains unpaid at this date.

It appears in evidence that on the 27th day of April, 1885, certain judgements were recovered in the circuit court for this district against D. R. Smith and Walter B. Crane, copartners in trade under the firm name of D. R. Smith & Co., upon the default of D. R. Smith, the only one of the defendants who was served, and the executions were lodged to bind the property of said firm and the individual property of D. R. Smith, but not the separate property of Walter B. Crane.

Under said judgments and executions the marshal of this court, at Kingstree, in the county of Williamsburg, on the 7th day of September, 1885, sold the interest of the said D. R. Smith & Company and the interest of D. R. Smith individually in the real estate of D. R. Smith & Co. for the sum of thirty-eight hundred and fifty dollars to Thomas R. McGahan, who is one of the defendants in this suit, and on the same day executed and delivered to him as purchaser a deed of conveyance of the following property described in said deed, viz:

All the tract of land known by the general appellation of Britton's Ferry, with the buildings and improvements thereon (except the steam saw-mill, with engine, boilers, and all appurtenances belonging thereto, known as Smith's mills, which are not to be sold), containing five hundred acres, more or less; and situate, lying, and being partly in Williamsburg county and partly in Georgetown county, the boundaries of said tract of land described in a deed from
Mary C. Eddy to Cle Martin, bearing date August 10th, 1860,
99 being as follows: * * *

Also all the tract lying in Snow island, containing eighteen hundred and thirty-six acres according to a resurvey and plat made by William Ervin the 27th day of September, 1860; also another tract on which the former residence of A. W. Dozier stands, separated

from the tract above named by Clarke's creek and containing two thousand seven hundred and nine acres according to a resurvey and plat thereof made by Wm. F. Ervin the 27th day of September, 1866; also one other tract, on which the above-named A. W. Dozier's summer residence stands and separated from the second tract above mentioned by the public road leading from Sockee bridge, by Mrs. Stone's residence, to the old mill known as Johnson's mill and containing one thousand and seventy-five acres according to a resurvey and plat thereof made by Wm. F. Ervin 27th September, 1867, the said three tracts constituting one united body of land, containing in the aggregate five thousand six hundred and twenty acres, situate, lying, and being on the south side of the Big Pee Dee river, in the county of Williamsburg, in the State of South Carolina, and known as Longwood plantation.

Also all that tract of land known as the Horse Shoe Lake tract, containing six hundred and eighty-seven acres, more or less, and situate, lying, and being in Marion county, South Carolina, the boundaries of said tract of land described in a deed from Mary R. Johnson to W. B. Crane, Edward Tompkins, and D. R. Smith, bearing date the 12th day of November, 1871; also all that tract of land in Georgetown county, South Carolina, levied on by virtue of an execution against J. M. Matthews and deeded to W. B. Crane, Edward Tompkins, and D. R. Smith by J. W. Lesesne, sheriff of Georgetown county, South Carolina, dated September 6th, 1876. * * *

The property so conveyed to McGahan is the same property the three-fourths interest in which was mortgaged by Walter B. Crane to The National Bank of Rondout, the complainant here. It appears that the said Thomas R. McGahan, assuming to be the owner of the entire property, shortly after said sale to him executed to the defendant in this case, Mrs. E. P. Smith, wife of the above-named D. R. Smith, a lease of said property, including the mills, machinery, and the personal property connected therewith, and that since
100 that date (November, 1885) the said D. R. Smith, as agent for his wife, has been using the said mill property for their own purposes and have been carrying on an extensive business in cutting and shipping lumber.

The bill prays a foreclosure of the mortgage and a sale of the property and an injunction restraining the defendants from using the property.

The only defence set up in the joint answer of Thomas R. McGahan, D. R. Smith, and E. P. Smith, his wife, is that the property mentioned in the bill and which Crane mortgaged to the Bank of Rondout was, in 1869, agreed to be purchased and held as partnership property of D. R. Smith & Co., under the articles of copartnership between George North, Walter B. Crane, Edward Tompkins, and the defendant D. R. Smith, to be used for agricultural purposes and for the manufacture of lumber; that machinery was purchased and a large saw-mill erected and other improvements put upon said premises by said copartnership; that thereafter the interest of said George North and Edward Tompkins in said copartnership was purchased by said Walter B. Crane, who, with the defendant David R.

Smith, continued said business under the firm name of D. R. Smith & Co. The said premises were in the notorious possession of the defendant D. R. Smith as resident copartner as and for copartnership property, and that the complainant (The National Bank of Rondout) knew that it was such; that said mortgage was executed without the knowledge or consent of the said David R. Smith and the property so mortgaged was first subject to the rights of the creditors of the said copartnership. It is contended by the defendants that Thomas R. McGahan by virtue of said sale became and is the owner of the premises described in said mortgage, and that he is entitled to hold and enjoy the same free from the lien of the mortgage.

The evidence shows that the title to the three undivided one-fourths in the fee of the said real estate was conveyed by regular deed to Walter B. Crane, the mortgagor, who, with his wife concurring, conveyed them to the National Bank of Rondout by way of mortgage to secure the copartnership debt of D. R. Smith & Co. The title deeds to Crane show no trust of any kind qualifying Crane's absolute title. There is no evidence to show any special trust which would restrict or qualify Crane's right to make an absolute conveyance of his undivided three-fourths interest in
101 said real estate and the improvements thereon of the nature of fixtures or appurtenances thereto belonging.

The witness James Hasbrook, who was president of the National Bank of Rondout, and who, as such, required from Walter B. Crane the execution of the mortgage to secure the debt of D. R. Smith & Co. to the bank, swears that he understood that Mr. Crane owned three-fourths of the property. He also testified that he never before the mortgage was executed to the bank, nor for two years after November 7th, 1885, during which the bank continually extended indulgence to D. R. Smith & Co. on the debt of the firm by receiving from time to time the notes of the firm to the bank, received any notice from D. R. Smith of his objecting to the mortgage given by Crane.

There is satisfying evidence that D. R. Smith knew that the mortgage had been given as security for the debt of D. R. Smith & Co.; that he knew that the notes were renewed, and that he by his silence entirely acquiesced in the act of Crane in giving the mortgage to the bank.

It is unnecessary to consider the question whether three-fourths in the land and fixtures appurtenant to the land were or were not partnership property, and whether, as such, were first liable to copartnership debts in priority to the individual interests of the copartners therein, because, assuming this to have been the nature of the property, the mortgage of the partnership assets by one copartner for the benefit of the partnership without the assent of the other partner would in the absence of fraud (which is not here suggested) be undoubtedly valid as a security to a particular creditor to whom it was mortgaged; *a fortiori*, if made with the assent, express or implied, of the other partner, who, as in the case of D. R. Smith, knew of the mortgage, did not object, and who participated

in the benefit of the extension of the debt which the firm of D. R. Smith & Co. obtained from the bank.

The title which Thomas R. McGahan, as purchaser, acquired under the sale and conveyance in September, 1885, made by the marshal under the execution against the firm of D. R. Smith & Co. and the individual interest of D. R. Smith, could be no better or higher than that which the firm had or could have claimed in the property so sold and conveyed. As D. R. Smith & Co. and D. R. Smith could not have claimed to hold the property in derogation of the right to the three-fourths interest therein
102 of the National Bank of Rondout under the mortgage given to it in 1883 to secure the debt of E. R. Smith & Co., so the defendant Thomas R. McGahan cannot claim against the right of the bank to three undivided fourths in said land and improvements and fixtures.

It is therefore ordered, adjudged, and decreed that the lease of the whole property made by Thomas R. McGahan to E. P. Smith be, as to said property, annulled, and that the said Thomas R. McGahan account before James E. Hagood, who is hereby appointed special master for taking said account, for three-fourths of the rents and profits of said property from the seventh day of September, 1883, when he assumed the possession and ownership of the whole property, and for any waste which may have been permitted by him of said property between that date and the date of his accounting.

It is further ordered that the equity of redemption, which was in the mortgagor, Walter B. Crane, in said real estate and appurtenances, be and the same is hereby, foreclosed, and the rights of the heirs of said Walter B. Crane and of all persons who may claim under or through him be forever barred.

It is further ordered that the marshal of this court, after advertising said property for three weeks in the Charleston News & Courier, do sell, at public auction, on a sale day, at Kingstree, in said State, all the undivided three-fourths interest in the land hereinafter particularly described which was of Walter B. Crane in his lifetime and of which he was seized and possessed and which was mortgaged by him to the National Bank of Rondout; that out of the proceeds of said sale the costs of this proceeding and of the sale shall be first paid and the balance shall be paid to the solicitors of the complainant, to be credited on the debt secured by the mortgage hereby foreclosed.

The following is a description of the mortgaged premises: All the undivided three-fourths of all those tracts and parcels of land situate in the county of Williamsburg and State of South Carolina, containing eighteen hundred and thirty-six acres according to a resurvey and plat thereof made by Wm. Ervin the 27th day of Sept., 1866; also another tract, on which the former residence of A. W. Dozier stands, separated from the tract first above mentioned by Clark's creek, and containing two thousand seven hundred
103 and nine acres according to a resurvey and plat thereof made by Wm. Ervin the 27th day of September, 1866; also one other tract, on which the above-named A. W. Dozier's summer

house stands and separated from the second tract above mentioned by the public road leading from Sockee bridge, by Mrs. Stone's residence, to the old mill known as Johnson's mill, and containing one thousand and seventy-five acres according to a resurvey and plat made thereof by Wm. F. Ervin 27th day of April, 1867—

The said lands having such forms, marks, buttings, and boundaries as on reference to said several plats will more fully and at large appear, the said three tracts constituting one united body of land and containing in the aggregate five thousand six hundred and twenty acres (5,620), situated, lying, and being on the south side of the Big Pee Dee river, in the county of Williamsburg and State of South Carolina, and known as Longwood plantation, and being the same premises conveyed to George North by A. W. Dozier by deed bearing date the sixth day of May, 1869, and recorded in the clerk's office of Williamsburg county, in Book —, pages 361 & 362, on the eight- day of May, 1869.

Also all the undivided three-fourths of all that certain tract or parcel of land known by the general appellation of Britton's Ferry, containing five hundred acres, more or less, and situate, lying, and being partly in Williamsburg county and partly in Georgetown county, in the said State of South Carolina; the boundaries of said tract of land are described in a deed from Mary A. Eddy to C. W. Martin, bearing date 10th August, 1860, being as follows: On the north by land of E. H. Britton, on the east by Pee Dee river, on the south by lands of S. J. White, and on the west by lands of W. A. Larrimore, and being the premises or same lands conveyed to George North by C. W. Martin, and the deed of which is recorded in the office of register of mesne conveyances, Georgetown county, S. C., June 5th, 1869, in Book "B," pages 471 and 472.

HUGH L. BOND, *Ct. Judge.*

[Seal U. S. Circuit Court, District of So. Carolina.]

25th Feb'y, 1891.

104 And on the 2nd day of March, 1891, came into court the defendants, by their solicitors, J. N. Nathans and Samuel Lord, and filed the following notice of appeal and allowance of appeal:

Appeal and Allowance.

THE UNITED STATES OF AMERICA, }
District of South Carolina, Fourth Circuit. }

In the Circuit Court.

THE NATIONAL BANK OF RONDOUT, NEW YORK, Complainant, }
vs.
THOMAS R. MCGAHAN, D. R. SMITH, and E. P. SMITH, Defendants. }

The above-named defendants, Thomas R. McGahan, D. R. Smith, and E. P. Smith, conceiving themselves aggrieved by the order en-

tered on the 25th February, 1891, in the above-entitled proceeding, do hereby appeal from said order to the Supreme Court of the United States and pray that their appeal may be allowed, and that the transcript of the record and proceedings and papers upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States.

J. N. NATHANS,
Att'y for T. R. McGahan.
SAMUEL LORD,
Att'y for D. R. Smith and Elizabeth P. Smith.

And now, to wit, on the 2nd of March—

105 It is ordered that the appeal be allowed as prayed for.

CHARLES H. SIMONTON,
U. U. Judge.

2nd March, 1891.

106 And on the 5th day of March, 1891, the court filed the following order fixing the amount of supersedeas bond:

Order.

THE UNITED STATES OF AMERICA, }
District of South Carolina. }

In the Circuit Court.

THE NATIONAL BANK OF RONDOUT }
vs. }
THOMAS R. MCGAHAN *et al.* }

Motion to fix the amount of supersedeas bond.

If the decree in this case provided simply for the foreclosure of a mortgage of real estate, the amount of the bond would be fixed at a sum to cover the damages arising from the detention of the money secured by the mortgage measured by the interest on the money due. Mass. & Southern Construction Co. *vs.* Cherokee, 42 Fed. Rep., 754. That is the course laid down in rule 29 of the Supreme Court in "all suits where the property in controversy necessarily follows the event of the suit, as in real actions, replevin, and in suits on mortgages;" but the decree orders the defendant to account for three-fourths of the rents and profits of said property from 7th September, 1883, and for any waste permitted by him of the said property between that date and the date of his accounting.

This part of the decretal order takes the case out of Kountz *vs.* Omaha Hotel Co., 107 U. S., 394, and out of this part of rule 29. The limit of this liability to account is the amount of the judgment heretofore secured by the complainant, some thirteen thousand dollars, with interest from 1887. From the evidence taken in the

cause and submitted to the court (the judge hearing this motion not having sat on the trial), it appears that the land covered by the mortgage owed its chief value to the timber upon it, and that this has nearly all been cut away.

107 Beside this, it is manifest from the tenor of the decree that the presiding judge was under the impression that the land was not a sufficient security for the debt. Not only does he order this accounting in aid of the complainant, but he directs the proceeds of sale to be paid over, costs and expenses being deducted, to the complainant, to be credited on the debt. No provision is made for the surplus, and apparently no surplus is anticipated.

Under these circumstances I fix the amount of the supersedeas bond at fourteen thousand dollars.

CHARLES H. SIMONTON,
U. S. Judge.

5th March, 1891.

108 And on the 10th day of March, 1891, came into court the defendants, by their solicitors, J. N. Nathans and Samuel Lord, and filed the following supersedeas bond:

Supersedeas Bond.

Know all men by these presents that we, Thomas R. McGahan, A. S. Brown, and Alva Gage, of the city of Charleston and State of South Carolina, are held and firmly bound unto the National Bank of Rondout, Rondout, New York, a national bank located in the State of New York, in the full and just sum of fourteen thousand dollars, to be paid to the said The National Bank of Rondout, their certain attorneys, successors, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 10th of March, in the year of our Lord one thousand eight hundred and ninety-one.

Whereas lately, at a term of the circuit court of the United States for the district of South Carolina, in a suit depending in said court between The National Bank of Rondout, Rondout, New York, complainants, and Thomas R. McGahan, D. R. Smith, and E. P. Smith, defendants, a decree was rendered against the said Thomas R. McGahan, D. R. Smith, and E. P. Smith, and the said Thomas R. McGahan, D. R. Smith, and E. P. Smith, defendants, have appealed from said decree to the Supreme Court of the United States, praying that said decree may be reversed:

Now, the condition of the above obligation is such that if the said Thomas R. McGahan, D. R. Smith, and E. P. Smith shall prosecute their said appeal to effect and answer all costs and damages if they

shall fail to make their plea good, then this obligation shall be void; otherwise to remain in full force and virtue.

109 T. R. McGAHAN. [L. S.]
A. S BROWN. [L. S.]
ALVA GAGE. [L. S.]

Signed, sealed, and delivered in the presence of—
J. R. D. KENNEDY,
Witness as to signature of T. R. McGahan and A. S. Brown.
HARMON R. LUHN,
As to Alva Gage.

Approved:

CHARLES H. SIMONTON,
U. S. Judge.

110 UNITED STATES OF AMERICA, }
District of South Carolina. }

In the Circuit Court.

THE NATIONAL BANK OF RONDOUT }
vs. }
THOMAS R. McGAHAN *et al.* }

To National Bank of Rondout, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the first day of April, eighteen hundred and ninety-one, pursuant to an appeal filed in the clerk's office of the circuit court of the United States for the district of South Carolina, on 2 March, 1891, wherein Thomas R. McGahan, D. R. Smith, and E. P. Smith are appellants and The National Bank of Rondout is respondent, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties on that behalf.

Witness the Hon. Melville W. Fuller, Chief Justice of the United States, this 3 day of March, in the year of our Lord one thousand eight hundred and ninety-one.

CHARLES H. SIMONTON,
U. S. Judge.

[Endorsed:] United States of America, district of South Carolina. In the circuit court. National Bank of Rondout *vs.* Thomas R. McGahan *et al.* Citation. Ent. on journal, page 496. Charleston, So. Ca., March 3, 1891. We acknowledge due service of within citation. Barker, Gilliland and Fitzsimons, solicitors for the National Bank of Rondout, Rondout, N. Y. Filed M'ch 3, 1891. J. E. Hagood, C. C. C. U. S., dist. S. C.

111 THE UNITED STATES OF AMERICA, } ss.
District of South Carolina, Fourth Circuit.

In the Circuit Court.

I, J. E. Hagood, clerk of the circuit court of the United States for the district of South Carolina, do hereby certify that the foregoing is a true and correct copy of the records, proceedings, decree, &c., in the case of The National Bank of Rondout, New York, complainant, against Thomas R. McGahan, Elizabeth P. Smith, and D. R. Smith, defendants, rendered as aforesaid, together with all the proceedings had in the cause relating to the same.

Given under my hand and seal of said court, at clerk's office, in the city of Charleston and district of South Carolina, this the 10th day of March, A. D. 1891.

[Seal U. S. Circuit Court, District of So. Carolina.]

J. E. HAGOOD,
C. C. C. U. S., Dist. S. C.

Endorsed on cover: Case No. 14,532. South Carolina C. C. U. S. No. 104. Thomas R. McGahan, D. R. Smith, & E. P. Smith, appellants, *vs.* The National Bank of Rondout, N. Y. Filed March 21, 1890.

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OCT 19
JAMES H. McKENN

Supreme Court of the United States.

156-218

OCTOBER TERM, 1894.

THOMAS R. McGAHAN AND E. P. SMITH, APPELLANTS,

vs.

THE NATIONAL BANK OF ROUNDOUT, NEW YORK.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

ARGUMENT FOR APPELLANTS.

CHARLESTON, S. C.
WALKER, EVANS & COGSWELL CO., PRINTERS,
Nos. 3 and 5 Broad and 117 East Bay Streets.
1894.

Supreme Court of the United States.

OCTOBER TERM, 1894.

THOMAS R. McGAHAN AND E. P. SMITH, APPELLANTS,

vs.

THE NATIONAL BANK OF ROUNDOUT, NEW YORK.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

ARGUMENT FOR APPELLANTS.

STATEMENT OF FACTS.

On the 1st May, 1869, George North, Edward Tompkins, Walter B. Crane and David R. Smith, entered into an agreement for the formation of a copartnership for the purchase of two plantations, situate in Williamsburg and Georgetown Counties, South Carolina, known as Longwood and Britton's Ferry, and for their cultivation, and for the erection thereon of saw mill or saw mills, for the cutting, manufacturing and preparing for market the timber growing on said plantations, or otherwise obtained. Page 44, fols. 71, 72.

In pursuance of this preliminary agreement, and in fulfilment of its terms, A. W. Dozier conveyed to George North, by deed dated 6th May, 1869, the several tracts of land known

as Longwood Plantation, and C. W. Martin, by deed, recorded on the 5th June, 1869, the tract of land known as Britton's Ferry. These conveyances do not appear in the record, but are recited in the description of the property contained in the mortgage to the Bank, and the deed from George North to Edward Tompkins and W. B. Crane, hereinafter referred to.

On the 2nd day of July, 1869, George North conveyed to Walter B. Crane "the equal undivided fourth part of the land known as Longwood Plantation and Britton's Ferry, (p. 22, fols. 33–35,) and on the same day conveyed an equal undivided fourth in same lands to Edward Tompkins; (p. 29, fols. 45–47.)

The record does not disclose the deed from George North to D. R. Smith, but such a conveyance to him of one equal undivided fourth of said land must have been executed, because, on the 28th August, 1869, D. R. Smith, by unrecorded deeds, mortgaged his undivided one-fourth interest in the lands to Walter B. Crane and Edward Tompkins. (Pp. 32–34, fols. 49–56.)

At this time, then, each of the partners held the legal title to one undivided ¼ of the partnership real estate.

On the 30th August, 1869, after the purchase by George North, and the conveyances by him to Crane, Tompkins and Smith as above, they all entered into formal articles of copartnership, dated on that day. (P. 46, fol. 73.)

These provided that they should be partners in the purchase and cultivation of the Longwood and Britton's Ferry plantations, and in the manufacture and sale of lumber growing upon the plantations, or obtained elsewhere. By this agreement it was stipulated that the firm name should be D. R. Smith & Co., that each partner should contribute $9,000, of which $2.000 was to be paid immediately, and the balance as required from time to time for the payment of the purchase money of the plantations, as the same should become due, and for the purchase of mills and machinery, &c., &c. Article II declares, that D. R. Smith shall be the active and resident partner, requires him to transmit to the others monthly statements *and authorizes him to use and sign the name of the firm* in all transactions necessary to conduct the business of the copartnership.

W. B. Crane and Edward Tompkins, having purchased the interest of North in the partnership on the 28th November, 1871, North conveyed to Crane, in consideration of $4,000, the undivided eighth part of the lands; p. 27, f. 41. The remaining eighth he conveyed to Tompkins on the same day; (page 24, f. 37.)

Crane thus acquired the legal title to ¼ and ⅛ or ⅜ of the lands, and Tompkins the legal title to ⅜ thereof.

By an endorsement on the original articles of copartnership made on 1st October, 1874, (p. 47, f. 75) it was agreed between Crane, Tompkins and Smith to continue the business so long as mutually satisfactory.

On March 1st, 1877, p. 39, f. 61, Tompkins, in consideration of the conveyance by Crane to him of certain real estate, agrees to transfer to him "his whole and entire interest in all and every description of property now held in the name and firm of D. R. Smith & Co., located in South Carolina with lumber and book accounts at Rondout, N. Y. But no conveyance of Tompkin's ⅜ interest in the partnership real estate was ever made, and so far as the evidence in this case discloses, Crane never acquired the legal title to Tompkins' undivided ⅜ of the partnership real estate.

On the same day 1st March, 1877, (p. 47, f. 75) this endorsement was placed on the original articles of copartnership. "Edward Tompkins having this day disposed of his interest to W. B. Crane in the above agreement W. B. Crane and D. R. Smith hereby agree to continue the business as per enclosed agreement until April 1st, 1878.

In accordance with the terms of the original articles of partnership, machinery was purchased, a large saw mill erected and other improvements were put upon the real estate, all of which were paid for with the funds of the copartnership. The business was carried on under the firm name of D. R. Smith & Co., on the premises which were in the notorious possession of D. R. Smith as resident copartner. This continued until the sale in 1885 to McGahan.

Among the debts of the copartnership in 1883 were four notes due to the Bank of Rondout, N. Y., for three thousand dollars each and endorsed by Walter B. Crane and Henry M.

Crane. These notes had run so long that the officers of the bank "began to feel that they were not so secure as they ought to be," page 56, folio 59. The president of the bank therefore requested W. B. Crane to secure the bank by giving it a mortgage " on the property of D. R. Smith & Co., in South Carolina."

Crane promised to see Smith and afterwards Smith came to Rondout and an interview took place between Smith and the President at the bank. Smith protested against giving the mortgage on the ground that it would injure the firm's credit in South Carolina. The president urged the necessity of the mortgage, but in vain, p. 56, f. 89. He says:

"I then spoke to Crane and told him that as Smith did not seem disposed to do anything, I wished him to give us a mortgage on his share of the property. Crane told me that he owned three-fourths of the property. He then gave the bank a mortgage on his share of the property dated November, 1883. p. 57, f. 89. The president knew that the property so mortgaged was copartnership assets. "I was informed the partnership assets were land, wood, timber, saw mill and machinery. I obtained the most of it from Walter B. Crane from admissions of D. R. Smith from conversations which I had with him at the bank. I ascertained that such assets consisted partly of real estate—the real estate consisted of farming lands, wood lands, saw mill and machinery; the personal property consisted of cut wood, lumber, tools and machinery. I knew the business of the firm in South Carolina was partly cutting down timber, preparing it for market and shipping it. I supposed the land mortgaged to the bank, from information I had, was in possession of the firm and used in their business. I supposed it constituted part of the partnership assets, (p. 59, f. 93-94.)

The mortgage (p. 18, f. 27,) conveys to the mortgagee the undivided three-fourths of the Longwood and Britton's Ferry tracts. It is executed by Crane and his wife, the latter renouncing dower, and provides that in the event of default and sale under power the overplus after satisfying the mortgage debt, shall be paid to said Walter B. Crane, *his heirs or assigns.*

It does not profess to have been executed in the name or on

behalf of the firm of Smith & Co., and the bill alleges *that it was given to secure the endorsement by Walter B. Crane* of the said notes, p. 2, f. 3.

The mortgage was executed 30th November, 1883. The laws of South Carolina required it to be recorded within forty days. It was not, in fact, recorded in Georgetown County until 27th February, 1885, and in Williamsburg not until 6th March, 1885. P. 22. f. 32. This was not the result of oversight. When it was given, Crane requested that it should not be recorded at once. P. 59, f. 89. "The agreement was that he was to notify the bank when it should be recorded. * * * It was withheld from record at the request of Crane. Perhaps the main part of withholding it from record was because it was feared the recording of it would impair the financial reputation of D. R. Smith & Co. We did not want to injure their credit if we could help it. * * * It was recorded in 1885 upon Crane's consent and by solicitation." Folio 94-95. Testimony of Hasbrouck, president of the bank.

On the 27th April 1885, Judgments were recovered in the Circuit Court of the United States against D. R. Smith and Walter B. Crane, copartners trading under the firm name of D. R. Smith & Company upon the default of D R. Smith, the only one of the defendants who could be served, F. 25, p. 18, and executions were lodged to bind the property of said firm and the individual property of D. R. Smith. Under said judgments and executions the marshal, on the 7th day of September, 1885, sold the interest of the said D. R. Smith & Company, and the interest of D. R. Smith individually in the Longwood and Britton's Ferry plntations, for the sum of thirty-eight hundred and fifty dollars to Thomas R. McGahan, who is one of the defendants in this suit, and on the same day executed and delivered to him as purchaser a deed of conveyance of the same.

Shortly after this sale, McGahan executed to Mrs. E. P. Smith, the wife of D. R. Smith, a lease of the property purchased by him, including the mills, machinery and the personal property connected therewith, and since that date Mrs. Smith has been using the mill property, and has carried on the business of cutting, manufacturing and shipping lumber and timber.

In December, 1887, the complainant recovered in the Circuit Court of the United States for South Carolina judgment on the notes to secure which the mortgage to complainant was given, and not until September 26th, 1889, was the bill filed in this cause and under which no injunction was moved for or obtained.

PLEADINGS.

The bill in this case was filed by the National Bank of Rondout, against Thomas R. McGahan, Elizabeth P. Smith and D. R. Smith. The heirs of Crane were not made parties nor was Edward Tompkins. The bill sets up that Crane was seized in fee of the undivided ¾ of the Britton's Ferry and Longwood Plantation, the execution by Crane and his wife of the mortgage to the Bank of Rondout, to secure the endorsement of Crane, sale by the marshal and the conveyance to McGahan, the lease by McGahan to Mrs. Smith, cutting down of the timber on the lands, and the removal of the same, prays that the defendants set forth the claim under which they are in possession of the lands, that they may be enjoined from cutting and removing the timber from the lands, that they may set forth the amount, number and value of the trees cut by them since McGahan came into control of the property, that they may account for the value of the timber so cut, that they might be permitted within a reasonable time to redeem the mortgage, if they or any of them have the equity of redemption thereof, and that failing so to do, the property may be sold and the proceeds of sale applied to the debt of the bank. It also prays a writ of injunction.

The joint and several answer of the defendants sets up that the property mentioned in the Bill and which Crane mortgaged to the Bank of Rondout, was purchased and held as co-partnership property, that machinery had been purchased and a large saw mill erected, and other improvements put upon the premises by the co-partnership. That the premises had always been in the notorious possession of the defendant, D. R. Smith, as resident co-partner, as and for co-partnership property. That the Bank of Rondout knew that it was such, and that the mortgage was executed without the knowledge or consent of

D. R. Smith, the managing partner. It sets out the judgments recovered in the United States Circuit Court, the levy under the executions issued thereof, the sale and conveyance to McGahan. It claims that the principal value of the property consists in the saw mill and other improvements put upon the property by the co-partnership, which it alleges were levied upon as the personal property, and purchased by McGahan, and that the mortgage to the Bank of Rondout could not, and did not purport to cover the same.

The defendant, McGahan, alleges that by virtue of the purchase from the marshal, he became the owner of the premises described in the mortgage, that the property having by the terms of the articles of co-partnership been held as co partnership property, was liable to co-partnership debts in priority to the individual interest of the co-partners therein, and that by virtue of the sale, and his purchase, he is entitled to hold the same free from the lien of the complainants mortgage. The answer admits that the defendant, Elizabeth Smith, was in possession of the premises under a lease from McGahan, and was carrying on the business of manufacturing lumber, and for that purpose had used such timber as was necessary for that purpose.

DECREE.

The decree finds the execution of the mortgage, in November, 1883, and that it was held by the National Bank of Rondout in its possession, and was, at the request of Walter B. Crane, withheld from registry in South Carolina from the date of its delivery in November, 1883, until the 17th of February, 1885, when it was recorded in Georgetown, and on the 6th of March, 1885, when it was recorded in Williamsburg County. It finds further, that the evidence shows that the title to the three undivided fourths in the fee of the mortgaged premises, was conveyed by regular deeds to Walter B. Crane. That said deeds show no trust of any kind qualifying Crane's absolute title. That there was no evidence to show any special trust which would restrict or qualify Crane's right to make an absolute conveyance of his undivided three-fourth interest in said

real estate and the improvements thereon, of the nature of fixtures or appurtenances thereto belonging. That Hasbrook testified that he understood that Crane owned three-fourths of the property, and also that he never, before the mortgage was executed, nor afterwards during the two years that the Bank was extending indulgence to Smith & Company on the debt of the firm, had received any notice from Smith of his objecting to the mortgage given by Crane. The Circuit Judge thought it unnecessary to enquire whether the ¾ interest in the land and fixtures appurtenanced to the land, were or were not partnership property, because assuming this to have been the nature of the property, Crane had a right to mortgage the partnership assets to secure the partnership debts, without the assent of the other partner; a *fortiori*, such a mortgage would be good in this case, D. R. Smith who knew of the mortgage, not objecting and participating in the benefit of the extension of the debt, which the firm of Smith & Company obtained from the bank. That Smith & Company could not have claimed to hold the property in derogation of the right of the National Bank under its mortgage, and the defendant, McGahan, could have no better or higher right than that which the firm had or could have claimed in the property sold. The Court ordered the lease made by McGahan to be annulled. That he account before a Special Master for ¾ of the rents and profits of the property from the 7th of September, 1885, when he assumed possession thereof, and for any waste which may have been permitted by him of said property, between that date and the date of his accounting.

It was further ordered, That Walter B. Crane's equity of redemption be foreclosed, and the rights of his heirs be forever barred, and directed the premises to be sold by the marshal, and the proceeds of sale to be applied to the complainant's claim.

From this decree an appeal has been taken, and the plaintiff now files the following Assignments of Error.

ASSIGNMENTS OF ERROR.

I.

Because the Court should have held that the conduct of the mortgagor in withholding the mortgage from record under an agreement with the mortgagor, and for the purpose of giving the firm a fictitious credit was void as against the creditors who had been thereby misled.

II.

Because the Court erred in holding that "the evidence shows that the title to the three undivided fourths in the fee of the mortgaged premises was conveyed by regular deed to Walter D. Crane." Whereas it is submitted that the evidence showed that the legal title to only three-eighths in fee of the premises had been so conveyed to Walter B. Crane, the legal title to the three-eighths which he acquired from E. Tompkins never having been conveyed to him, and Crane having only acquired an interest therein, by purchasing the share of Tompkins in the copartnership assets, with the right to compel Tompkins to make a conveyance of the legal title.

III.

Because the Court erred in holding "that there was no evidence to show any special trust which would restrict or qualify Crane's right to make an absolute conveyance of his undivided three-fourths interest in the said real estate." Whereas, it is submitted that the evidence showed that the said real estate was purchased, and the improvements thereon erected by the copartnership of D. R. Smith & Company, with copartnership funds, and for copartnership purposes, and therefore that the firm had an equitable right, accompanied by an equitable title, to said real estate, though standing in the name of the several copartners, which not only qualified and restricted, but destroyed Crane's right to make an absolute conveyance of that portion of the joint property which stood in his name without the consent, and against the protest of his copartners, and these facts were known to the bank when the mortgage was taken.

IV.

Because the Court erred in holding (if it has so held) that D. R. Smith, the managing partner, ever assented expressly to a mortgage by the firm or either of its partners, of the partnership property. On the contrary the evidence shows that he protested against such mortgage on "the ground that it would injure the firm's credit in South Carolina." It was not his duty, and he had no right to object to the mortgage afterwards given by Crane on "his share of the property," even if he knew of its existence, of which there is no evidence.

V.

Because the Court erred in holding that it was "unnecessary to consider the question whether the three-fourths of the land and fixtures appurtenant thereto were or were not partnership property."

Because if said property be held to be partnership property the mortgage given by Crane to the bank in compliance with the request of the President after he had failed to get a mortgage from the firm, that he would give the bank a mortgage "on his share of the property," must be construed as intended to give the bank a lien only upon the surplus which should be found to be coming to Crane upon a settlement of the partnership affairs.

VI.

Because the Court erred in decreeing that Thomas R. McGahan's account before James E. Hagood, as Special Master for taking such account, for three-fourths of the rents and profits of said mortgaged property from the 7th day of September, 1885, when he assumed the possession in that a mortgagee in South Carolina has no estate in the mortgaged property and no right of possession, but only a lien thereon for the satisfaction of his debt, and the property mortgaged to the bank having been co-partnership property, McGahan by his purchase under the judgment, acquired the legal and equitable title to Smith's ¼ interest, and the equitable title to so much thereof as stood in the name of Walter B. Crane, with the right to call upon him for the legal title thereto, and as owner in fee was not liable to account to the bank as mortgagee

for rents and profits from the time of his purchase or at any time.

VII.

Because the Court erred in decreeing that McGahan account for any waste which may have been permitted by him of said property between the date of his purchase and his accounting under the decree, In that even if McGahan purchased the property subject to the mortgage, the mortgagee having no estate whatsoever under the laws of South Carolina in the mortgaged property, is not entitled to an account for waste, and further, in that the bill does not allege nor does the evidence show that the mortgagor was insolvent or that McGahan used the property in any other manner than was consistent with his legal and equitable rights, or that the property is an insufficient security for the debt.

ARGUMENT.

I.

The defense to the mortgage disclosed in the first assignment of error was not made in the answer, though pressed upon the Court at the hearing, and should not be denied to the appellants, if tenable, because of this failure so to make it.

Under Section 1776 of the General Statutes of South Carolina, a mortgage of real or personal estate "shall be valid so as to affect from the time of delivery or execution the rights of subsequent creditors or purchasers for valuable consideration without notice, only when recorded within forty days from the time of such delivery or execution, in the office of the Register of Mesne Conveyance of the county where the property affected thereby is situated in the case of real estate. * * * * * * Provided, nevertheless, that the above mentioned deeds or instruments in writing if recorded subsequent to the expiration of said period of forty days, shall be valid to affect the rights of subsequent creditors and purchasers for valuable consideration without notice only from the date of such record."

In King vs. Fraser, 23 S. C., 543, the Supreme Court of South Carolina construing this Section, held that by "subsequent creditors" were meant subsequent lien creditors, and that as against general creditors who became such between the execution of and recording the mortgage was entitled to priority. This does not, however, affect the question of whether the mortgage was valid in its inception, which must be determined on the principles of the common law. In this state of the law only such an agreement between Crane and the bank as would vitiate the mortgage at common law would avail the appellants, and the evidence of such agreement could only be had in the course of the proceedings in this cause. Crane had been dead two years when the bill was filed, even if we could conceive that he would voluntarily have disclosed it, and the bank only furnished evidence of it under the pressure of a searching cross-examination. The answer was prepared without a suspicion of the existence of the agreement testified to by Hasbrouck as made between Crane and himself when the mortgage was given. He says, folio 89, page 56:

"The agreement was that he, Crane, was to notify the bank when it should be recorded. It was witheld from record at the request of W. B. Crane. Perhaps the main part of withholding it from record was because it was feared the recording of it would impair the financial reputation of D. R. Smith & Co. We did not want to impair their credit if we could help it. The reason the mortgage was recorded in 1885 was, that we received notice from Mr. Crane that it might be recorded."

The notes for which the mortgage was demanded were renewals of notes running from 1880 Folio 26, p. 18. This long period of extensions had justly excited the apprehension, of Hasbrouck who says (folio 89, p. 56,) that "they were not so secure as they ought to be." In the most favorable interpretation of this admission from the bank, it is a confession that the solvency of D. R. Smith & Co., was doubtful and the agreement was intended to secure a secret lien on nearly the whole of the debtor's property at the expense of general creditors existing and future.

In Blennerhasset vs. Sherman, 105 U. S., p. 117, the Court said:

"It is not enough to support a settlement against creditors, that it be made for a valuable consideration. It must also be *bona fide*. If it be made with intent to hinder, delay or defraud them it is void as against them, although there may be in the strictest sense a valuable or even an adequate consideration," and cites with approval, Hengerford vs. Earle, 2 Vern, 261, where it was held that a "deed not at first fraudulent may afterwards become so by being concealed or not pursued, by which means creditors are drawn on to lend their money." From Nov., 1883, to Feb., 1885, the bank held this mortgage as a secret lien on the property under an agreement with the mortgagor made at the time of its execution that it should not be recorded until notified by him, and for the specific purpose of not injuring the credit of D. R. Smith & Co. Not until the latter part of February, and the early part of March, 1885, was the mortgage recorded, just prior to the recovery of the judgments against the firm by Brown Bro. & Co. and Stelling under which McGahan purchased. The inference is reasonable, that it was so recorded in consequence of the institution of the actions resulting in such judgments, and thus reveals the character of the fraud which the agreement was intended to accomplish.

In Hilderburn vs. Brown, (17 B., Mon. Ky., 779.) quoted with approval in Blennerhasset vs. Sherman, *supra*. it is said: "Such contrivances or acts, though not designed to perpetrate an actual fraud upon other persons, have an undeniable tendency that way, and are obviously opposed to the general policy of the law requiring the public registration of all liens and incumbrances upon property permitted to be retained and claimed by debtors. If not directly in that class of acts which the law denominates constructive fraud, it approximates so nearly to it that the party showing himself a participant in such transactions ought not to receive the countenance or aid of the Chancellor in enforcing any lien or claim growing out of it against a third person."

In Lowry vs. Pinson, 2 Bailey, (S. C.,) 324, where the defendant, to defeat the recovery of damages for a breach of promise of marriage, made a sale of his lands for full consideration to a purchaser who had knowledge of the fraudulent intent, and the purchase money was applied to the payment of *bona fide* creditors of the vendor, and this application of the

purchase money was relied upon to sustain the sale the Appeal Court of South Carolina said through Judge Johnson.

"I do not perceive how the defendant's case is helped by the circumstances that the purchase money was disbursed in the payment of Isaac Pinson's just debts. The defendant cannot be in a better situation than the creditors themselves would have been, and that relationship between them could not sanctify a fraud by which Isaac J. Pinson was enabled to evade the plaintiff's demand. A debtor may, it is true, honestly prefer one creditor to another, yet in the case of Worsley vs. DeMattos, Burr, 482, Lord Mansfield remarks that the contract giving the preference even to a *bona fide* creditor would be void, if the means to attain such preference were fraudulent."

Is it a less obvious fraud to agree to withhold a mortgage from record to secure a continuing credit for the mortgagor with the public, and record it when the creditors, whose confidence was thus betrayed, would be defeated in recovery of their debts by the interposition of the mortgage?

II.

Crane acquired the legal title to only three-eighths of the land by the conveyances from North, dated respectively July 2, 1869, (folio 33,) and Nov. 28, 1871. (folio 41.) The three-eighths of Tompkins was transferred to him by the agreement of March 1, 1877, (folio 71,) of his whole and entire interest in all and every description of property now held in the name and firm of D. R. Smith & Co., located in South Carolina." The Circuit Judge therefore clearly erred in holding that three undivided fourths in the fee of the mortgaged premises was conveyed by regular deed to Walter D. Crane.

III.

The Court erred in holding, "that there was no evidence to show any special trust which would restrict or qualify Crane's right to make an absolute conveyance of his undivided three-fourths interest in the said real estate."

By the articles of copartnership, (p. 46, f. 73.) the copartners expressly agree to become copartners in its purchase and culti-

vation, and in the manufacture and sale of the lumber and timber growing upon it, and provide that the capital to be furnished by them shall be applied to the payment of the purchase money of the land. It was necessary for the ordinary operation of the partnership business, and was actually so employed from the time of the purchase until it was sold under judgment recovered against the partnership and under which McGahan purchased. The improvements consisting of machinery and buildings erected and put upon the lands were paid for with copartnership capital and profits. It is true, conveyances of the legal title were made to the several parties, according to their respective interests as copartners, but though at law this made them tenants in common, in equity the property is deemed copartnership property, and the partnership is the equitable owner thereof.

Huxie vs. Cave, 1 Sumner, 174.
Hiscox vs. Phipps, 49 N. Y., 997.
Cavender vs. Bulteel L. R. Ch. App. Vol. ix., p. 79.

In this case this results not from any constructive trusts arising from the use of the copartnership assets in the purchase of the land, but is the very basis of the association of the copartnership resting on contract and not implication. That the land was the property of the partnership was known to the bank, and there can be no pretence that it was misled as to the tenure by which the property was held, by the fact that upon the records the legal title stood in the names of the several partners. The continued use and possession of the property by the firm would alone have been constructive notice of the equitable right of the copartnership, (Jones on Mort., par, 120,) and this is certainly the law in South Carolina.

Massey McElwaine, 2 Hills. Ch., 427.
Stroman vs. Varn, 19 S. C., 308.

But the evidence shows that the bank, before it took the mortgage, actually knew that the land was copartnership property. The president of the bank asked for a mortgage on the property of D. R. Smith & Co. in South Carolina. "This failing, he asked for a mortgage on Crane's share of the property, (fol.

89.") He further says: "I ascertained that the assets consisted partly of farming lands, wood lands, saw mills and machinery. I supposed the land mortgaged, from information I had, was in possession of the firm and used in their business. I supposed it constituted part of the partnership assets." (F. 93, 94.)

Thus affected with this notice, the bank took the mortgage subject to the rights and equities of the partners.

Huxie vs. Cave, 1 Sumner, 174.
Menan vs. Whitsell, 52 N. Y., 143.
Tabel vs. West, 86 N. Y., 280

The legal title in Crane being thus restricted, he could not execute a mortgage of the partnership real estate without the concurrence of all the partners.

Lindley on partnership, 139.

"No partner, and no number of the partners can sell or transfer the real estate of the firm outright for money, or by way of mortgage to secure a debt, without the consent and authority of the other partners.

Parsons on Partnership, par. 377.

"A legal mortgage cannot be made of partnership real estate without the concurrence of all the copartners."

Collier on Part., p. 670.

In Gibson vs. Warden, 114 Wall., 244, the principle on which this doctrine rests is recognized, and Mr. Justice Swayne, delivering the opinion of the Court, says: "This is not inconsistent with the principle which seems too deep rooted in the law to be wholly eradicated by judicial authority, that a sealed instrument in the name of a firm by one of its members, without the proper authority where a seal is necessary, is the deed of such member only, and that he alone is bound by it.

In South Carolina the general rule is, that one copartner has no power to bind his copartners by deed or other instrument requiring seal.

Stroman vs. Varn, 19 S. C., 307.
Sibley vs. Young, 26 S. C., 415.
Hull vs. Young, 30 S. C., 121.

A seal is necessary to a mortgage in South Carolina.
Arthur vs Screven, 39 S. C., 77.

In Stroman vs. Varn, *supra.*, the question arose under a mortgage given by one of four partners in the name of the firm, and signed in the firm name. The general rule that one partner cannot bind another by deed was recognized as applicable to mortgages of real estate, but the particular mortgage in question was upheld on the ground that the other copartners had in many ways acknowledged and ratified the mortgage.

IV.

In the case before the Court it cannot be pretended that Crane was authorized in advance by Smith to execute the mortgage in question. The eleventh article of copartnership agreement (fol. 74, p. 47,) confers upon Smith alone, as the active and resident partner, authority to use and sign the name of the firm in all transactions necessary to conduct the business of the copartnership. So far from consenting to the execution of the mortgage, Smith protested against it. Nor is there any evidence of subsequent ratification by him. The Circuit Judge says: "He knew of it, did not object, and participated in the benefit of the extension of the debt which the firm of Smith & Co obtained from the bank," (folio 101, p. 64). There is not a tittle of evidence to show that he even knew of it until after the judgments were recovered by Brown, Sons & Co. and Stelling, and execution levied upon the mortgaged property. In a letter to Crane dated Sept. 3, 1885, but four days before the sale at which McGahan purchased, Smith says: "I could have made any reasonable arrangement with the creditors here before the bank mortgage was known, but now cannot. The sale will be subject to the bank mortgage, as I suppose they are acting in concert with the bank. The creditors here were all disposed to help us, but preference to bank killed it." (folio 77, p. 48.) This is the only evidence of any knowledge on the part of Smith of the existence of the mortgage, and manifests no approval on his part in so far as it affected the partnership. He had opposed and protested against the giving of any lien or mortgage on the partnership property when it was proposed by the President of the bank, because of

its effect upon the credit of the firm, and this letter simply proves that his judgment was right, not that he knew or approved of it. In his testimony the President of the bank says: "He (Crane) then gave the bank a mortgage upon his share of the property, dated Nov. 1883, and requested the bank not to have the mortgage recorded at first. Afterwards he said that he had conferred with Mr. Smith; we then sent the mortgage down and had it recorded." (fol. 89–90, p. 57.) It will be observed that the statement "afterwards he (Crane) said he had conferred with Mr. Smith," does not imply that Smith approved of it, even if intended to refer to the mortgage, while later on Hasbrouck, in reply to the question whether Smith had knowledge of the fact that the mortgage had been given by Crane, says: "I cannot say of my own knowledge whether he did or not," (folio 91, p. 58) and on cross examination, (folio 95, p. 60) says: "The reason the mortgage was recorded in 1885 was that he received a notice from Mr. Crane that it might be recorded; nothing more than this."

Certainly this is not satisfying evidence that D. R. Smith knew that the mortgage had been given as security for the debt of D. R. Smith & Co.," and by his silence acquiesced in the act of Crane, in giving the mortgage to the bank." Having protested against the giving of the mortgage when it was proposed by Crane and Hasbrouck, he was not bound to renew the objection after it was placed on record nearly two years afterwards, and when it did not purport to be a mortgage of the interest of the partnership in the land. A purchaser of partnership assets is not affected by the lien of mortgage executed by one of the partners on his interest, and McGahan acquired the property by purchase, free of the mortgage held by the bank.

Tabel vs. West, 80 N. Y., 280.

V.

The Court clearly erred in holding that it was unnecessary to consider the question whether the three-fourths of the land and fixtures appurtenant thereto were or were not partnership property. If it was partnership property, then the legal title in Crane was held in trust for the partnership, and his individ-

ual interest was subordinate to that of the partnership and distinct from it. This individual interest could be sold or mortgaged by him for a copartnership debt if his copartner opposed and protested against a mortgage by the firm of the firm's interest, or for his individual debt. In this case not only the circumstances under which it was given, but the provisions of the mortgage show that it was not intended to bind the partnership interest. It was executed by Crane individually, in his own name, and not in the name and as the act of the firm or the other copartners. In Clark vs. Houghton & Andrews, 12 Gray, 38, it was held that the execution of a mortgage of personal property of a partnership by a partner in his individual name passed no title.

While the notes were copartnership notes they were endorsed by Crane, and the bill alleges that the mortgage was given to *secure the endorsement by Crane of said notes.* The testimony of the President of the bank leaves no doubt that it was given and accepted as the individual mortgage of Crane upon his individual interest in the land. Smith having refused to unite in a mortgage to the bank on the ground that it would injure the firm's credit, the idea of obtaining a mortgage on the copartnership interest was abandoned, and Crane consented, on the solicitation of the president, to give a mortgage "on his share of the property."

His share individually was the surplus after the debts of the firm and the equities of the parties interested were adjusted. The surplus under the express terms of the mortgage after payment of the notes was to be paid to "Walter B. Crane, his heirs or assigns," fol. 29, p. 20.

The mortgaged property, being as we have seen clearly, copartnership property, if the mortgage had been intended to carry the partnership interest in the property, it would have reserved the surplus to the partnership, and not to Crane, "his heirs and assigns."

If, therefore, the land belonged to the firm when the bank obtained from Crane the mortgage upon his interest thereon, it acquired nothing more than the right to have any balance

coming to Crane upon a final adjustment of the partnership account applied to the payment of its debt.

Fourth National Bank vs. New Orleans and G R. R. Co., 11 Wall, 624.

In Bantley vs. Bates, 4 Y. & C., 190, Baron Abinger said:—

"If you look to the Constitution of a mercantile partnership, what is the meaning of a partner mortgaging his share? Nothing more than that he covenants to pay the amount borrowed. It conveys no interest in the partnership effects."

VI.

A mortgagee is not entitled to rents and profits unless a lien thereon is given in the mortgage.

In South Carolina by Special Statute it is provided:—

"That no mortgagee shall be entitled to maintain any possessory action for the real estate mortgaged even after the time allowed for the payment of the money secured by mortgage is elapsed—but the mortgagor shall be decreed the owner of the land and the mortgagee as owner of the money lent or due and shall be entitled to recover satisfaction for the same out of the land by foreclosure and sale."

General Statutes of S. C., § 2299, p. 655.

The above provision is a re-enactment of the law as contained in the General Statutes of 1872, with the exception of a part of the proviso therein, that "the provisions thereof shall not apply when the mortgagor shall be out of possession." * * * By the Act of 1879, (17 Stat. 19) this provision that the Act should not apply "when the mortgagor shall be out of possession" was stricken out and so amended, was re-enacted in the General Statutes of 1882 as above set forth and was the law in force when the mortgage to the Bank was given.

Navassa Guano Co. vs. Richardson, 26 S. C., p. 408.

The bank had no better right to the rents and profits as against McGahan than it had against Crane.

In Hardin vs. Hardin, 34 S. C., p. 80, 81, the Supreme Court of South Carolina say :—

"By our law a mortgage of real estate is not a conveyance of any estate whatever, but is simply a contract whereby the mortgagee obtains a lien on the property mortgaged, as a security for the payment of a debt. The mortgagor still remains, even after condition broken, the owner of the mortgaged premises, and retains all the rights incident to such ownership, amongst which is the right to receive the rents and profits, while the mortgagee simply holds a lien upon the property to secure the payment of his debt, which he may enforce in any of the modes recognized by law. But having no title to or ownership of the mortgaged premises, he cannot claim any of the rights incident to such a relation. His rights are limited by the terms of the contract as found in the mortgage, and by that contract he simply has a lien on the mortgaged premises, and that he may enforce in any proper way. * * * It seems to us, therefore, that the question whether the mortgagee can before or pending proceedings for foreclosure, subject the rents and profits of the mortgaged premises to the payment of his debt, depends entirely upon the contract of the parties, as stated in the mortgage. If there is a stipulation therein that the mortgagee shall have a lien upon the rents and profits, as well as upon the land, then of course such a lien may be made effective by the appointment of a receiver, under proper allegations and proof; but if the mortgage contains no such stipulation, then the mortgagee has no higher or better claim to the rents and profits than any unsecured creditor of the mortgagor."

In Hardin vs. Hardin, supra, an order appointing a receiver of rents and profits in a foreclosure proceeding was vacated as erroneous, because the mortgage contained no stipulation for a lien on them. Even where under law, the mortgagee is entitled to possession upon default, he is not entitled to rents and profits so long as the owner of the equity of redemption is allowed to remain in possession.

In Teal vs. Walker, 111 U. S., page 242, this Court said through Mr. Justice Woods: "The case of Moss vs. Gallmore has never been held to apply to a mortgagee

or vendee of his equity of redemption. Lord Mansfield himself in the case of Chinney vs. Blackman, 3 Doug. 391, held that until the mortgagee takes possession the mortgagor is owner to all the world, and is entitled to all the profits made. * * * * The American cases sustain the rule that so long as the mortgagor is allowed to remain in possession he is entitled to receive and apply to his own use the income and profits of the mortgaged estate; and although the mortgagee may have the right to take possession upon condition broken, if he does not exercise the right he cannot claim the rents; if he wishes to receive the rents he must take means to obtain possession."

McGahan purchased the equity of redemption on the 7th of September, 1885, not until 29th September, 1889, did complainant take any action whatsoever under his mortgage, no Receiver was applied for, and even under the law as unmodified by Statute in South Carolina, the Circuit Court erred in so decreeing an account of rents and profits to be taken in favor of the bank as against McGahan. If the mortgaged land was not co-partnership property McGahan should be liable only to the heirs of Crane, who are not parties to the proceedings.

VII.

Waste is an injury to the inheritance, and the commission thereof creates a liability only to the owner of the inheritance in remainder and reversion.

"Waste, in short, may be defined to be whatever does a lasting damage to the freehold or inheritance, and tends to the permanent loss of the owner in fee, or to destroy or lessen the value of the inheritance."

1. Washburn on Real Property, p. 110.
4. Kent Com. p. 76.

A mortgagee in South Carolina has no estate whatsoever but simply a lien.

Hardin vs. Hardin, supra.

In Hughlett vs. Harris, 1 Del. Ch. 349, the Court say:

"The acts alleged to be done and complained of were done by persons having at the time the fee simple title to the lands and the person now claiming an account then had no title. I can find no case in the books to warrant a claim for an account in such a case as this, and am of opinion that the complainant is not entitled to such a decree."

In this case a judgment creditor sued out an injunction to restrain waste upon land covered by the lien of his judgment and pending the injunction purchased the land at the Sheriff's sale, and it was held that he was not entitled to an accounting for waste committed prior to his purchase.

In Angier vs. Agnew, 98 Pen. State Rep., it was held that a mortgagor of land may continue to cut and sell the timber growing thereon, although insolvent.

But under any assumption of liability for waste what is actionable waste must be determined by all the facts and circumstances of the case. Thus it is said in 1 Washburn on Real Property. p. 143, in treating of the rights of a doweress to her lands: "And if the mode of using the land has consisted in cutting the growth upon it as the customary source of profit, the widow may continue to do so. Thus to cut and sell staves and shingles as hoop poles under the circumstances above supposed, would not be waste."

In Searle vs. Sawyer, 127 Mass., 491, where the question was as to the liability of the mortgagor or one claiming under him for lumber cut on the mortgaged land, in which State the mortgagee takes an estate in fee, the Supreme Court say:

"But the severance must be wrongful, and where it is made by the mortgagor or one acting under his authority whether it is wrongful or not will depend upon the question whether a license to do the act has been *expressly given* or *is fairly to be implied from the relations of the party*. The true rule is as stated in Small vs. Moore, 11 N. H., 85, and approved in Roye vs. Robinson, 10 Cush. 99, that acts of the mortgagor in cutting wood and timber, or otherwise severing parts of the realty *are*

not wrongful when from the circumstances of the case the assent of the mortgagee may be reasonably presumed."

When the mortgage to the bank was given D. R. Smith & Co. were carrying on the business of sawing and shipping to market the timber cut from the mortgaged land. The President of the bank knew this when the mortgage was taken, acquiesced in this use of the mortgaged property from November, 1883, when he took the mortgage until the bill herein was filed in September, 1889, did not move for an injunction, sued and recovered judgment on the notes secured by the mortgage in 1887, and we submit that from the circumstances of the case the assent of the mortgagee may be reasonably presumed to the continued use of the property to the extent and in the manner intended when the mortgage was given.

The mortgage was given to secure the endorsement of Crane on the notes of D. R. Smith & Co., as admitted in the complainant's bill, and there is no evidence that Crane or his estate is insolvent. If even an action on the case in the nature of waste would lie in favor of a mortgagee it should appear that the mortgagor was insolvent and the security insufficient.

SAML. LORD,
J. N. NATHANS.
For Appellant.

NOV 12 18
JAMES H. McKENNEY
CL

Supreme Court of the United States.

156-218

OCTOBER TERM, 1894.

No. 104.

THOMAS R. McGAHAN, D. R. SMITH AND E. P. SMITH,

APPELLANTS.

versus

THE NATIONAL BANK OF RONDOUT, NEW YORK,

APPELLEE.

Brief of THEODORE G. BARKER,

For Appellee.

CHARLESTON, S. C.
WALKER, EVANS & COGSWELL CO., PRINTERS,
Nos. 3 and 5 Broad and 117 East Bay Streets.
1894.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM 1894.

No. 104.

THOMAS R. McGAHAN, D. R. SMITH AND E. P. SMITH,
APPELLANTS.

vs.

THE NATIONAL BANK OF RONDOUT NEW YORK.
APPELLEE.

Appeal from the Circuit Court of the United States for the District of South Carolina.

Brief of Theodore G. Barker for Appellee (The National Bank of Rondout, N. Y.)

STATEMENT OF THE CASE.

On the 6th day of May, 1869, A. W. Dozier conveyed to George North, three several tracts of land in South Carolina, constituting one united body of land and containing in the aggregate 5,620 acres, situated on the south side of the Big Pee Dee River, in the County of Williamsburg, in said State and known as the "*Longwood Plantation.*"

On the 6th June, 1869, C. W. Martin conveyed to said George North a tract of land known as "Britton's Ferry, containing 500 acres, situated in Williamsburg County" said State.

The deeds of A. W. Dozier and of C. W. Martin respectively to George North are not in the record, but their contents and the fact of their execution and date of their record in the office of Registry are set forth, viz: p. 19, fol. 27 and 28: p. 22, fol. 34; p. 25, fol. 37–38; p. 27 and 28, fol 41–42; p. 30, fol. 45–46; p. 32, fol. 50–51; p. 35, fol. 54–55; and p. 40, fol. 63-64. (The latter is the deed put in evidence by appellants and under which appellant McGahan claims.) George North being thus seised in fee of said land, on the 2d July, 1869, in consideration of $2,500 conveyed to Walter B. Crane, his heirs and assigns one undivided fourth (¼) part thereof. P. 22, fol. 33. Ex. B.

On same day said George North in consideration of $2,500 conveyed to Edward Tompkins his heirs and assigns one undivided *fourth* part of said lands. P. 29, fol. 45. Ex. E.

On 28th November, 1871, said George North in consideration of $4,000 conveyed to Edward Tompkins his heirs and assigns an "undivided one-eighth (⅛) part" of said lands. P. 25, fol. 37. Ex. C.

On same day said George North in consideration of $4,000 conveyed to Walter B. Crane his heirs and assigns an undivided one-eighth (⅛) part of said land. P. 27, fol. 41. Ex. D.

It appears that D. R. Smith became the nominal purchaser of one undivided fourth (¼) part of said land, although no conveyance thereof to him appears.

The Record shows that on August 28th, 1869, he executed to Walter B. Crane, a mortgage of all his interest in said land (p. 32, fol. 49. Ex. F.) and on same day a like mortgage to Edward Tompkins. (P. 34, fol. 54. Ex. "G.") These deeds are unrecorded.

These deeds both recite, that Crane and Tompkins had each lent to D. R. Smith the sum of $1,322, "to enable him to pur-

chase, take and hold an undivided fourth part of the premises," and that it is agreed by and between the said parties, that the money so lent as aforesaid and such as may be hereafter lent and advanced by Crane and Tompkins to Smith "*shall be a lien and charge* upon the right and interest of" D. R. Smith "in the land and premises thereinafter mentioned and described and the buildings and erections thereon, or which shall or may hereafter be erected thereon."

The title to the property thus stood until — —, 1877, viz: Walter B. Crane, 3/8: Edward Tompkins 3/8 and D. R. Smith 1/4, but this 1/4 charged for the use of Crane and Tompkins for the payment of the purchase money of D. R. Smith's 1/4 and their other advances.

On March 1, 1877, "the whole and entire interest" of Edward Tompkins was transferred to Walter B. Crane (p. 39, folio 61 on p. 42, folio 67) giving him 3/4 of the property by purchase and the remaining 1/4 nominally in D. R. Smith but charged with the resulting trust for the purchase money paid for Smith by Crane and Tompkins and mortgaged to them as above—the transfer of Tompkin's interest in Smith's 1/4 to Crane giving Walter B. Crane the title by direct purchase to 3/4 and the equitable title to Smith's 1/4.

On November 30, 1883, Walter B. Crane conveyed to the appellee, the National Bank of Rondout "the undivided three-fourths of all those tracts and parcels of land "constituting and known as "Longwood." *Also* all the undivided three-fourths of all that certain tract or parcel of land known by the General appellation of Britton's Ferry" in consideration of the sum of $12,000. (P. 18, folio 27.)

"This grant," the deed recites, "is intended as a security for the payment of four promissory notes amounting in the aggregate to $12,000 or the renewal or renewals of them or either or any of them, together with the lawful discount or interest thereon, said notes being made by David R. Smith and Walter B. Crane, under their firm name of D. R. Smith & Co., and endorsed by Walter B. Crane and Henry M. Crane. * *"

Upon default in payment of the last renewals of said notes in 1885 the condition of said mortgage became broken and the three undivided fourths of the lands and buildings, &c., thereon became forfeited in law to the appellee, the National Bank of Rondout.

The bill in this case for the sale of said property for injunction to stay waste and for discovery and account and for general relief, was brought by the National Bank of Rondout in the Circuit Court of the United States for the District of South Carolina, on the 26th September, 1890, and a decree rendered in accordance with the prayer of the bill, on 25th February, 1891. P. 61, fol. 97.

The bill, among other facts alleged, that on 30th November, 1883, Walter B. Crane was "*seised and possessed in fee of all the undivided three-fourths of all those parcels or tracts of land.* * * (As described above, and in the mortgage deed of Crane.)

This allegation is not denied in the answer, but the attempt is made to represent the land and buildings to be *copartnership* property, in face of the deeds and transfers, which show, that the title was vested in Walter B. Crane individually, by actual purchase made by him, with his own private funds, so far as appears, and wholly independently of the funds of the copartnership.

The record contains no evidence whatsoever that one dollar of the purchase money of the undivided three-fourths held by Walter B. Crane and mortgaged by him to the Bank of Rondout was paid or contributed by the copartnership, or out of partnership funds of D. R. Smith & Co., yet the joint answer of Thomas R. McGahan, (the party claiming as purchaser of the whole property at public sale,) of Mrs. Elizabeth, wife of D. R Smith, (the pretended lessee of Thomas R. McGahan,) and of D. R. Smith, boldly alleges, (p. 8, fol. 18): "That on the 30th day August, 1869, articles of copartnership under the name and style of D. R. Smith & Co., were entered into between George North, Walter B. Crane, Edward Tompkins and the defendant, D. R. Smith, *whereby* the several tracts of land described in the complainant's bill were to be purchased and held *as the property of said copartnership* to be used, &c., * * and that

"the said premises were in the notorious possession of the defendant, D. R. Smith, *as resident copartner, as and for copartnership property, and complainant knew, or had means of knowing, that it was such,* * * " and that the said mortgage was executed without the knowledge or consent of the said David R. Smith, and the property so mortgaged was *subject to the rights of creditors of said copartnership.*"

The only other defence to the complainant's bill made in the answer is, that "under and by virtue of writs of execution of 28th April, 1885, on judgments recovered *against D. R. Smith & Co.* and D. R. Smith *individually*, the property described in said bill of complaint," (that is, the whole real estate, buildings, mill and other fixtures,) "was levied upon and sold by said Marshal at public outcry, on the 7th day of September, A. D. 1885, to the defendant, Thomas R. McGahan, for the sum of $3,850, he being at that price the highest bidder for the same, and a deed of conveyance dated said 7th day of September, 1885, was thereafter duly executed by said Marshal to the defendant, Thomas R. McGahan, that the defendant, *Elizabeth P. Smith*, is now in possession of said premises, *under a lease from said Thomas R. McGahan*, and carrying thereon the business of manufacturing lumber, and for that purpose, *has used such timber as was necessary for said purpose.*" * *

"And the defendant, Thomas R. McGahan further answering, alleges that by virtue of said sale and purchase as aforesaid, he became, and is *the owner of the premises described in the mortgage*, and that the said premises having by the terms of the articles of copartnership been held as, and for copartnership property were first liable to copartnership debts in priority to the individual interest of the copartners therein, and that by virtue of the sale and his purchase as aforesaid, *he is entitled to hold and enjoy the same free from the lien of said mortgage.*" No pretence is made that he holds for the benefit of the copartnership creditors of D. R. Smith & Co.

STATEMENT OF THE CASE, AS PRESENTED BY APPELLANTS, CONTROVERTED.

The points upon which the appellee controverts the statement of the case presented by appellants are as follows:

a. The statement, on page 1 of Appellant's Brief, that on the 1st May, 1869 George North, Edward Tompkins, Walter B. Crane and David R. Smith entered into an agreement for the formation of a copartnership "for the purchase of two plantations, &c., and "that in pursuance of this preliminary agreement and in fulfilment of its terms," the land was bought and held as copartnership property. The record shows, (pp. 44, 45, fols, 71, 72,) an agreement, *without date*, entered into by George North, W. B. Crane, E. Tompkins and David R. Smith, stating that "it is in contemplation to *erect by said parties a saw mill or mills* or other machinery for manufacturing, sawing and preparing timber for market now growing upon said plantation, or otherwise obtained, and also to cultivate said plantation for the production of grain, cotton, &c.'

The paper provides, that the "agreement is to be in full force and virtue from the first day of May, A. D. 1869." Inference from this is, that it was entered into at some time before said date. Be this as it may, it nowhere states that the agreement is entered into "for the formation of a partnership *for the purchase* of two plantations," nor is the purchase of the two plantations mentioned as a matter *in contemplation* at the date of the agreement.

On the contrary, the agreement speaks of the parties "*having purchased*" the lands, and of it being in contemplation to *erect a saw mill* for manufacturing timber for market and *to cultivate* the plantations.

The agreement, assumed by appellants to bear date 1 May, 1869, recites, that whereas "Walter B. Crane, Edward Tompkins, George North and David R. Smith, all of Rondout, in the town of Kingston, County of Ulster, and State of New York, *having purchased* in joint copartnership a plantation, &c."

It is very clear from the records of their purchases above set forth that by the words "in joint copartnership" the parties to

the agreement meant "as tenants in common," and that each was to purchase and pay for and to hold an undivided one-fourth of said lands in his own right.

The agreement recites, (p. 45, fol. 72) as follows:

"And whereas the said David R. Smith is unable at present to advance or pay his proportions of the capital to make the purchase and develop the same, and whereas the said W. B. Crane and Edward Tompkins agree to *advance* to the said D. R. Smith the sum of $5,000 in equal proportions, or $2,500 each from time to time, as the same may be required, or so much thereof as may be necessary to make purchase and develop the said property and conduct the business. * * * And the said D. R. Smith hereby agrees to and with the said W. B. Crane and Edward Tompkins for their security for any advances made and to be made, to mortgage *his one undivided one-quarter* of the above named property to the said W. B. Crane and Edward Tompkins. * *

The verbiage of this preliminary agreement of 1 May, 1869, in the use of the words joint copartnership, can not as evidence stand alongside of the solemn deeds above recited, or contradict the records of the acts of the parties which show that neither the Longwood nor Britton's Ferry Tract were purchased in joint copartnership, or with partnership funds, nor that any part of the said lands were copartnership property of the firm of D. R. Smith & Co. in 1869, or became so afterwards.

It is therefore an incorrect statement of the facts, to say, as Appellant's Brief does, on page 1, that "*In pursuance* of this preliminary agreement and in fulfilment of its terms, A. W. Dozier conveyed to George North by deed dated May 6, 1869, the several tracts of land known as Longwood Plantation and C. W. Martin by deed recorded on the 5th June, 1869, the tract of land known known as Britton's Ferry * * *" and to say, as on p. 2.

"At this time then each of the partners held the legal title to one undivided ¼ *of the partnership real estate.*"

There was then, and at no time afterwards, as far as the record shows, any *partnership real estate*, but each of the individual partners for himself separately and individually purchased, paid for, and held, his one undivided fourth part of the real estate in question in severalty, although, as tenants in common.

Even the one-fourth, purchased by D. R Smith and paid for by Crane and Tompkins, who furnished separately to Smith the

money to pay for it, was held as the *individual property* of Smith, and *as such* was mortgaged by him to Crane and Tompkins *to secure them* for the amounts advanced *by them*, respectively, *to him*.

b. It is erroneous to say, as on p. 3, of appellants' Brief, "W. B. Crane and Edward Tompkins having purchased the interest of North in the partnership on the 28th November, 1871, North conveyed to Crane in consideration of $4,000, the undivided eighth part of the lands."

It would appear from this statement of fact that "the undivided eighth part" of the lands had been or become *partnership real estate* and that North conveyed it to Crane as such, and in completion of the purchase by Crane and Tompkins of "*the interest* of North in *the partnership*."

But the record, p. 27, fol. 41, shows a separate deed from North to Crane of this one "undivided one-eighth part of the following lands" (describing them) "in consideration of the sum of $4,000 to him duly paid." The deed nowhere speaks of the one-eighth as copartnership real estate, nor is it conveyed as such, but it says that George North "doth grant to the said party of the second part his heirs and assigns the undivided one-eighth part of the following lands" specifically described. The deed of North to Tompkins (p. 24, f. 37,) is a counterpart of the deed from North to Crane.

The record *also* shows that the sale "of the interest of North in *the partnership*" (to wit: the mill business and personalty) and the purchase thereof by Crane and Tompkins was accomplished and evidenced by another and distinct deed under seal bearing date separately on the 29th day of December, 1871, one month after the deeds of 28th November, 1871, (of the one undivided eighth part of the land from North to Crane, and of the same to Tompkins.)

No clearer manifestation could have been made of the distinct conception by the parties of the tenure, by which the lands were held by them, viz:—as tenants in common, each owning and holding his separate though undivided part thereof, as distinguished from the tenure by which the *partnership interest* in the capital and personal estate was held.

The Deed of December 29th, 1871, p. 38, fol, 59, recites as follows:—

"Whereas, David R. Smith, George North, Walter B. Crane and Edward Tompkins, have heretofore been co-partners under the firm name and style of David R. Smith & Co., and whereas, the said George North has agreed to sell out, assign, transfer and set over all *rights, interest and property* of every name, nature and kind soever, *owned, possessed*, or in anywise *belonging to said firm*, to the said Walter B. Crane and Edward Tompkins, for and in consideration of the sum of $8,000."

"Now, therefore, this agreement witnesseth, that the said George North, for and in consideration of the sum of eight thousand dollars, to be paid as hereinafter mentioned, has and does hereby *sell, assign, transfer and set over all his right, title, claim, interest, demand, cause, or causes of action of every name, nature or kind soever, which he has in or to the aforesaid co-partnership rights or property, to the said Walter B. Crane and Edward Tompkins, &c.*"

And then follows the covenants by Crane and Tompkins by which they

"Agree to assume and pay *the indebtedness and liabilities of the said firm* and to keep and save the said North fully indemnified of, and from the payment of the same or any part thereof, and to pay the aforesaid consideration, as follows * * *."

The language used in this paper is that, which is in familiar use in the sale and transfer of a partnership interest, and is appropriate to the transfer of personal property, a share of partnership capital and partnership assets.

These separate and distinct Deeds also show that the considerations for the sales of the *land* and the consideration for the sale of the interest of George North in the partnership business and assets, were separate and different, $4,000 being the sum paid for "for the one undivided eighth part of the land" specifically described, and conveyed to Crane, and a like sum for the "one undivided eighth part,', conveyed to Tompkins.

FACTS FOUND BY THE CIRCUIT COURT.

1. That Walter B. Crane, the mortgagor, owned the undivided three-fourths of the property described in the bill. Page 61, folio 97.

2. That he mortgaged the same to the National Bank of Rondout, in November, 1883, to secure $12,000 of promissory notes, made by David R. Smith and Walter B. Crane, under the firm name of D. R. Smith & Co., and endorsed by Walter B. Crane and Henry M. Crane, and payable at the National Bank of Rondout. Ib.

3. That this mortgage was held by the National Bank of Rondout in its possession and was, at the request of Walter B. Crane, one of co-partners, withheld from registry in South Carolina from the date of its delivery in November, 1883, until the 17th February, 1885, *when it was duly recorded* in the office of the Clerk of the Court of Common Pleas of Georgetown Co., South Carolina, and the 6th day of March, 1885, when it was recorded in the office of the Register of Mesne Conveyances for Williamsburg County, in said State. Page 62. folio 97.

4. That the notes recited in the mortgage were not paid at maturity and were from time to time renewed, until the 6th, 17th and 29th days of June and the 3rd day of July, 1885, respectively, * * at the expiration of which times of payment they each became due and since said dates have remained unpaid. Ib. folio 98.

5. That on the 27th April, 1885, certain judgments were recovered in the Circuit Court for the District of South Carolina against D. R. Smith & Co., *upon the default of D. R. Smith, the only one of the defendants who was served* and executions were lodged to bind *the property of said firm* and *the individual property of D. R. Smith*, but *not the separate property of Walter B. Crane*. Ib.

6. That under said judgments and executions the marshal of this Court, at Kingstree, in the County of Williamsburg, on the 7th day of September, 1885, sold *the interest of the said D. R. Smith & Company*, and the interest of D. R. Smith individually in the real estate of D. R. Smith & Co., for the sum of $3,850—to Thomas R. McGahan, one of the defendants in this suit, and on the same day executed and delivered to him as purchaser, a deed of conveyance of the property described in

the deed, (Ib.) which is the same property, the three-fourths interest in which was mortgaged by Walter B. Crane, to the National Bank of Rondout. Page 63, folio 99.

7. That the said Thomas R. McGahan, assuming to be the owner of the entire property, shortly after the said sale to him executed to the defendant, Mrs. Elizabeth P. Smith, wife of the above named D. R. Smith, a lease of said property, including the mills, machinery and personal property connected therewith. Ib. folio 100.

8. That since November, 1885, the said D. R. Smith, as agent for his wife, has been using the said mill property for their own purposes, and has been carrying on an extensive business in cutting and shipping lumber. Ib., fol. 100.

9. That the title to the three undivided one-fourths in the fee of said real estate was conveyed by regular deed to Walter B. Crane, the mortgagor, who, with his wife concurring, conveyed them to the National Bank of Rondout to secure the copartnership debt of D. R. Smith & Co. P. 64, fol. 100.

10. That the title deeds to Crane show no trust of any kind qualifying Crane's title. Ib.

11. That there is no evidence to show any special trust which would restrict or qualify Crane's right to make an absolute conveyance of his undivided three-fourths interest in said real estate and the improvements thereon, of the nature of fixtures or appurtenances thereto belonging. Ib.

12. That there is satisfying evidence that D. R. Smith knew that the mortgage had been given as security for the debt of D. R. Smith & Co.; that he knew that the notes were renewed and that he by his silence entirely acquiesed in the act of Crane in giving the mortgage to the Bank. Ib., fol. 101.

ARGUMENT.

POINT FIRST.—*The Decree is sustained by the evidence.*

a. That "Walter B. Crane, the mortgagor, owned the undivided three-fourths of the property described in the bill."

We have shown Crane's title in the citations from the Record in our "Statement of the Case," and of the points on which "the statement of the case presented by appellants is controverted" by us, above set forth. Record, p. 22, fol. 33; p. 29, fol. 45; p. 24, f. 37; p. 27, f. 41; p. 32, f. 49; p. 34, f. 54; p. 39, f. 61; p. 42, f. 67.

b. In the appellant's second "Assignment of Error," it is said that "the legal title to the three-eighths which Crane acquired from Tompkins, "was never conveyed to him."

There is not any evidence that it was not actually and formally conveyed to him. It is true, that no deed of that three-eighths appears on the record, but the evidence is complete, that Crane acquired the interest of Tompkins. An exchange was made of lots owned by Crane at Pouhockie, Rondout, New York, by Crane, with Tompkins, for Tompkins's property in South Carolina. (P. 39, fol. 61.) The lots in Pouhockie are said to have been conveyed to Tompkins by "deed," and the presumption is, that there was a corresponding deed from Tompkins to Crane of the land in South Carolina. It is admitted that "Crane *acquired*" the three-eighths "from Tompkins," and that is all that is required for the purposes of this case.

c. It is also stated in the second assignment, that Crane *only* "acquired an interest therein by purchasing the share of Tompkins in the *partnership assets*." There is *no* evidence to justify this statement. There is also no evidence that Tompkins *did not* make to Crane a formal deed of his three-eighths interest in the Longwood and Britton Ferry tracts when he sold out his interest in the South Carolina partnership to Crane, separate and distinct from the deed of transfer of his share in the partnership assets, just as North did, as we have shown above,

when he sold out his interests to Crane and Tompkins. The presumption of complete ownership in Crane arising from the deed, conveying Crane's three-fourths of the lands to the National Bank of Rondout by way of mortgage, and also from the tenure by which he held the other three-eighths bought from North, is not rebutted by any evidence in the case, and is, on the contrary, sustained by all the proof in the record. If, as is admitted in the Assignment of Error, Crane had "the right to compel Tompkins to make a conveyance of the legal title," that is all that is needed to justify the finding of the Circuit Court that Crane, the mortgagor, owned the three-fourths of the lands mortgaged by him, in his own right.

d. It does not lie in the mouth of the defendant, David R. Smith, to make question in this proceeding as to the formal completeness of Crane's legal title to the three-fourths of the property. Smith knew of the mortgage. See his letters, p. 18, f 77. He regarded the mortgage as effective—*so* effective as to amount to "*a preference*" in favor of the Bank. No suggestion is made by Smith in the answer of any defect in Crane's ownership of the whole three-fourths interest mortgaged by him. He admits the execution of the mortgage. Neither is Smith examined as a witness to show any such defect. It is to be presumed that if there had been any such defect, or any doubt of Crane's title, Smith would have known of it, and knowing of it would have spoken of it and have made objection to it in his answer or in testimony. His only objections made in the answer are, that the land was "*partnership* property" that the mortgage was made without his knowledge or consent—that the property so mortgaged was first subject to the rights of creditors of said copartnership, and that his co-defendant, McGahan, is the owner of it by virtue of the sale by the United States Marshal.

All the defendants are estopped from raising, in an assignment of error before this Court, a question not raised in their answer—or in testimony—or so far as the record shows, in anyway in the Court below.

e. The third assignment of error claims that the Circuit Court erred in holding, "that there was no evidence to show any spe-

cial trust which would restrict or qualify Crane's right to make an absolute conveyance of his undivided three-fourths interest in the said real estate." And appellants contend "that the evidence showed, that said real estate was purchased, and the improvements thereon erected *by the co-partnership* of D. R. Smith & Company, *with co-partnership funds*, and *for co-partnership* purposes * *."

The *only* evidence resorted to by appellants to support the charge of error, in the Circuit Court's finding of the fact, and to support their assertion, that "the real estate *was purchased with co-partnership funds*," is the articles of co-partnership, page 46, folio 73, in which is set forth, *not what was done*, but what was *in contemplation*, or what the parties therein agreed to do.

The "Agreement of Co-partnership," says:—

"The said George North, W. B. Crane, Edward Tompkins and D. R. Smith, have agreed and by these presents do agree to become partners together, in the purchase and cultivation of two plantations, &c."

It will be noted that these articles bear date, "the 30th day of August, A. D., 1869."

There is *no* evidence whatever in the record of anything being done *in pursuance of* these particular articles of agreement. No proof that the capital contemplated for the partnership was ever paid up in whole or in part, nor by whom. No proof that one dollar of partnership funds was ever used for the purchase of Longwood or Britton's Ferry, or for any portion of the real estate described in the mortgage, viz:—Walter B. Crane's three-fourths of said lands.

On the contrary, as we have shown above from the record, each of the other three of the above named parties purchased by separate deeds from George North at different dates, in varying proportions, each for himself, at first, an undivided one-fourth, and afterwards two of the parties by separate deeds, each, an undivided one-eighth of the specific lands described as Longwood and Britton's Ferry and paid for their several purchases

respectively, each with his own money, except D. R. Smith, who borrowed from Crane and Tompkins the money to purchase his one-fourth—and the record shows that they each respectively held their shares as tenants in common, separately, to the end.

George North had previously purchased the whole real estate, viz:—from Dozier, the *Longwood* plantation, on the 6th May, 1869, and from Martin, the Britton's Ferry tract, June 5th, 1869. He sold to Walter B. Crane, ¼ on the 2nd July, 1869; to Edward Tompkins, ¼ on the same day, (and it is supposed) sold ¼ to D. R. Smith at some date prior to 28th August, 1869, on which day Smith mortgaged his ¼ to Crane and Tompkins, to secure them the money loaned by them respectively to him to enable him to purchase his one undivided fourth.

George North held independently his one undivided fourth until the 28th November, 1871, when he sold an undivided one-eighth *of said plantation* to Walter B. Crane and one undivided eighth part thereof to Edward Tompkins.

Edward Tompkins held his undivided ⅜ of the lands independently until March 1st, 1877, when he sold to Walter B. Crane.

Walter B. Crane held his undivided three-fourth so acquired until the 30th November, 1883, when he mortgaged it to the Bank.

In *all* of these deeds the lands purchased are specifically described by metes and bounds, and in *none* of them is the property described as "partnership property," or property purchased with partnership funds.

It is asserted in argument, that "the improvements thereon, were erected with co-partnership funds." Of this there is not a particle of proof in the Record. If true, it would have been easily capable of proof by the books of the firm, or by the testimony of D. R. Smith, and yet the books were not produced in evidence and D. R. Smith was not produced as a witness or examined.

It is possible, that the improvements were so erected, but if they were, that fact would not affect the title to the lands. Such improvements as became fixtures would enure to the owner of the land, and the cost of them would be a matter of mere co-partnership accounting.

The cost of the *improvements* being paid for with copartnership funds, if such had been proved, could not transform the title *in the land* from individual ownership into partnership assets.

The Circuit Court is fully sustained by the record in the finding "that there was no evidence to show any special trust which would restrict or qualify Crane's right to make an absolute conveyance of his undivided three-fourths interest in the said real estate."

MATTERS OF LAW.

1. The first assignment of error is "Because the Court should have held that the conduct of the mortgagee withholding the mortgage from record under an agreement with the mortgagor, and for the purpose of giving the firm a fictitious credit, was void as against creditors who had been thereby misled."

The argument of appellants (p. 11) frankly admits that this defense to the mortgage was not made in the answer. This admission should suffice to dispose of this ground of error.

"It is a general rule that questions not made on the trial or presented to the Court below for decision, cannot be entertained here." *1. Barroso v. Reab, 9 How. 366; Lathrop v. Judson, 19 How., 66; Ins. Co. of Va. v. Mordecai, 22 How., 111; DeSobry v. Nicholson, 3 Wall. 420; Clements v. Nicholson, 6 Wall, 299; Tome v. Dubois, 6 Wall, 548; The Georgia vs. U. S., 7 Wall, 32; Laber v. Cooper, Ib., 565; Alviso v. U. S., 8 Wall, 337; The Eagle vs. Fraser, Ib., 152; U. S. Ex. Co. v. Brothers, Ib., 342; First Natl. Bank v. Kentucky, 9 Wall, 353; Rogers v. Ritter, 12 Wall, 317; Klein v. Russel, 19 Wall, 433; Wood County v. Lackawanna I. & Co. Co., 93 U. S., 619; Wheeler v. Sedgwick, 94 U. S., 1; Wilson v. McNamee, 102, U. S., 572; Springer v. U. S., Ib., 586; Wood v. Weimer, 104 U. S., 786; Davis v. Frederick, 105 U. S., 4; Morrill v. Jones, 106 U. S., 466; Union Pac. Co. v. Myers, 115 U. S. 1.*

It is said in the "argument" that this point, viz: "the conduct of the Mortgagor in withholding the mortgage from record under an agreement with the mortgagee, and for the purpose of giving the firm a fictitious credit," though not made in the answer, was pressed upon the Court at the hearing."

There is no evidence of this in the record. The decree of the Circuit Court takes no notice of any such defense.

We submit that it is not competent to discuss it here at this stage of the cause.

There is undoubtedly evidence that the Bank of Rondout, at Crane's request, withheld Crane's mortgage from record for some length of time, as Mr. Hasbrouck, the President, testifies: "Perhaps the main part of withholding it from record was because it was feared recording would impair the financial reputation of D. R. Smith & Co. We did not want to injure their credit if we could help it." (p. 60, f. 94, 95.) He expressly says: "There was no agreement that the mortgage should not be recorded until the bank had reason to apprehend the insolvency of D. R. Smith & Co." (Ib.)

It will be remembered that this mortgage was not a mortgage by D. R. Smith & Co., but a mortgage of Walter B. Crane's undivided three-fourth's in certain real estate in South Carolina—which he had a complete legal right to sell or dispose of as he saw fit.

It might well be, that, in so far as creditors of the firm might look beyond the financial strength of the copartnership and to the private resources of Walter B. Crane, the recording or not recording of a mortgage by Crane of his real estate in South Carolina might affect the mind of a creditor of the firm—but not necessarily so; so, the withholding of it from record to prevent such possible effect upon the credit of D. R. Smith & Co., could not be, in law, evidence of a fraud upon the creditors of the firm. Suppose Walter B. Crane had made an absolute sale of his undivided three-fourths of this land, would the withholding of a conveyance of it, by his grantee, be capable of being criticised as an improper act, much less a fraud?

The records of mesne conveyances of real estate in South

Carolina had not at any time shown the Longwood and Britton Ferry plantations to be the property of the firm. There is no evidence that it was ever so represented to any creditor of the firm nor that any debt of the firm was contracted with any creditor on the faith of the ownership of those lands by the firm, or that any creditor was misled thereby. There was, then, no foundation for the idea that the withholding of the mortgage of Crane's ¾ interest concealed the withdrawal of any property belonging to the firm, or the creation of any incumbrance or the giving of any preference as to any property upon which creditors of the firm had a contract right to rely for payment of their debts,

So far as the records showed the real estate covered by the mortgage stood after 1871 as to ⅜ in Walter B. Crane and ⅜ in Edward Tompkins, with no ear-mark or sign of partnership property whatsoever.

How wide of the mark of accuracy then is the assertion that the mortgage of Crane to the Bank was withheld from record "under an agreement with the mortgager and for the purpose of giving a fictitious credit to the firm of D. R. Smith & Co.?" And how unfounded the imputation in argument (p. 13) where it is said that "Not until the latter part of February and the early part of March, 1885, was the mortgage recorded just prior to the recovery of the judgments against the firm of Brown Bro. & Co., and Stelling under which Mc Gahan purchased. The inference is reasonable that it was so recorded in consequence of the institution of the action resulting in such judgments, and thus reveals the character of the fraud which the agreement was intended to accomplish?"

2. It is well to note here by whom the defence is attempted now to be set up.

a. It is not made by any creditors of the firm of D. R. Smith & Co. No creditor of that firm, or of D. R. Smith, complains.

b. It is not made by any creditor who can claim or does

claim that he was misled by the withholding of the mortgage. No evidence is produced that any such creditor contracted a debt of D. R. Smith & Co., on the faith of Walter B. Crane's one-fourth interest in Longwood or Britton's Ferry Plantations being the property of D. R. Smith & Co.

No proof is attempted that Brown, Sons & Co., or Daniel C. Stelling were misled, or that they were creditors who dealt with D. R. Smith & Co. on the faith of that land being the real estate of the firm.

c. D. R. Smith was not a creditor and was not misled by it.

d. Thomas R. McGahan does not appear here as a creditor and does not claim in the pleadings or in testimony that he was misled by it.

He (McGahan) appears here as a *purchaser*, at the marshal's sale on 7 September, 1885, *six months* after he had legal notice of the mortgage by the records in February and March, 1885, He took whatever rights he acquired with full notice and subject to the mortgage. "Recording a mortgage deed is notice to all the world." *Dick vs. Baleh, 8 Pet. 30.*

It is to be presumed that, in the trifling sum of $3,850 which he is said to have paid for the property, the value of the mortgage lien was discounted in his favor as purchaser, on the assumption that he only took the interest (if any) which D. R. Smith & Co., might be able to claim in the land and after the mortgage should be paid out of the land.

e. So far as the record shows it does not appear by what authority the U. S. Marshal levied upon the Longwood and Britton's Ferry tract, as property of the firm of D. R. Smith & Co. If he was put up to it by D. R. Smith or the judgment creditor, it was a fraud in them and a trespass in the officer.

The record shows and the decree finds, (page 62, folio 98) that the judgments under which the sale to McGahan was made were recovered in the Circuit Court for the District of South Carolina, against D. R. Smith & Co., *upon the default of D. R. Smith, the only one* of the firm of D. R. Smith & Co.,

who was served, and that the executions were lodged to bind *the property of said firm* and the *individual property of D. R. Smith.* That under said judgments and executions the Marshal sold *the interest of the said D. R. Smith & Co.*, and the interest of D. R. Smith individually *in the real estate of D. R. Smith & Co.*

Upon all the proofs in this case in the Record, D. R. Smith & Co., as a firm, had no legal estate in the three undivided fourths of Longwood and Britton's Ferry plantation, and no "interest" in these lands.

So, also, the record shows, that D. R. Smith held the legal title to one-fourth, subject however, to the mortgages given by him to Crane and to Tompkins.

So that all that the Marshal really sold or could sell was D. R. Smith's equity of redemption in one undivided one-fourth of said plantation. And yet, the Marshal by his Deed conveyed, in fee to Thomas R. McGahan, (on the same day as the sale) the whole real estate consisting of the Longwood and Britton's Ferry tract describing them by metes and bounds.

The Decree of the Circuit is correct in holding (page 65, folio 101,) that:—

"The title which Thomas R. McGahan as purchaser acquired under the sale and conveyance in September, 1885, made by the Marshal under the execution against the firm of D. R. Smith & Co., and the individual interest of D. R. Smith could be no better nor higher than that which the firm had or could have claimed in the property so sold and conveyed. As D. R. Smith & Co., and D. R. Smith could not have claimed to hold the property in derogation of the right to the three-fourths interest therein of the National Bank of Rondout under the mortgage given to it in 1883, to secure the debt of D. R. Smith & Co., so the defendant, Thomas R. McGahan, cannot claim against the right of the Bank to three undivided fourths in said land, and improvements and fixtures."

3. When the facts are considered together, there is nothing

to recommend these appellants to consideration in a Court of Equity.

(1.) Thomas R. McGahan, appearing as purchaser under an execution sale, claims as owner, a large and valuable real estate, bid off by him at a trifling sum, as the property of a firm, D. R. Smith & Co., which firm the record shows had no legal or equitable title whatsoever to any part of the land; or, claims it as the property of a co-defendant, D. R. Smith, who, the record shows, had no interest in the land beyond the equity of redemption of a mortgagor of one undivided fourth under an unpaid mortgage.

(2.) *A sale* by the Marshal made under *a levy* (presumably directed by some interested person) made upon the land in question as the property of said firm, in the teeth of State Records showing *no* title in D. R. Smith & Co., and showing the legal estate in *other* persons—*and* made upon the land as the property, D. R. Smith, individually, whose only interest was one undivided fourth, subject to a recorded mortgage to *other* persons, viz:—Crane and Tompkins.

(3.) A conveyance by said Marshal of the fee in the entire land, whereas the extent of his legal authority was to sell and convey *only the interest* of D. R. Smith & Co., (if any there might be) and *the interest* of D. R. Smith individually, in said land.

The Deed of the Marshal (page 40, folio 62,) contradicts itself, in declaring the levy to be made under execution commanding him "of the goods and chattels, houses, lands and other hereditaments and real estate of the firm of D. R. Smith & Co., *and* of D. R. Smith individually." It does not appear what land levied upon was the land of D. R. Smith & Co., and what other land was the land of D. R. Smith, individually. It could not be made one and the same ownership by the act of the Marshal, and yet the deed says that by virtue of writs of *fieri facias* so commanding, "I have levied upon certain plantations or tracts of land with the buildings thereon, hereinafter, more particularly described."

It then proceeds, "and whereas, after due and legal notice *the said plantations or tracts of land were* * * by me sold. * *"

The deed then conveys to Thomas R. McGahan, "*all that tract of land &c.*, (describing Britton's Ferry and Longwood plantation) "together with all and singular, the members and appurtenances thereunto belonging, and *all estate, title and interest which the said firm of D. R. Smith & Co., and D. R. Smith individually of right, had in and to the same.*"

(4.) The conveyance to McGahan, dated, executed and delivered at Charleston, So. Ca., *the same day* as the sale at Kingstree, S. C.—50 miles away—shows extraordinary haste in the proceeding.

(5.) The putting of McGahan, by the Marshal into immediate possession of the entire property, followed speedily by a lease executed by said McGahan to Elizabeth P. Smith, *the wife of D. R. Smith*—the defendant in execution—*the only one of the firm of D. R. Smith & Co., who was served*, and one who had suffered judgment to be taken *by default* against himself and against his said firm.

(6.) The continued use of the property since the sale for the profit of D. R. Smith and wife, cutting up and selling the timber on the lands.

(7.) The concurrence of these parties in a joint answer in this case, in which D. R. Smith unites with his wife, and with McGahan, in the effort to defeat the mortgage of Crane to the National Bank of Rondout, given to secure the debt of D. R. Smith & Co.—by setting up the pretence, that said land was purchased by the firm of D. R. Smith & Co., with partnership funds—without the testimony of even D. R. Smith to sustain the pretence, and in face of the records showing the contrary.

The key-note of the entire argument on appeal is this effort to make it appear that the undivided three-fourths which Walter B. Crane owned in these plantations, was not his individual property, but was the property of D. R. Smith & Co.

The whole string of authorities cited by appellants apply to a state of facts, wholly differing from the facts proved in this record. Wherever application of the law contained in those authorities is attempted to be made to this case, the argument is based upon the reiteration again and again of the assumption that the property mortgaged by Crane to the Bank of Rondout was *partnership property* of D. R. Smith & Co., *purchased with funds of the partnership.*

The Circuit Court has found that this is not true. The record shows that the finding is sustained by the evidence in the cause. The false assumption of fact, the ground work of appellants' argument being removed, the whole structure necessarily falls.

We have not felt it necessary to dispute or comment upon a single one of appellants' citations of cases, which are not applicable to this case, or to cite, on a pure question of fact, any authorities.

The statement of facts made by the Court below in an admiralty or equity case is conclusive.

Wiscart vs. Dauchey, 3 Dall., 321.

When the Court below in an equity suit, on a full consideration of all the proofs, came to a conclusion on a question of fraud, this Court will concur with the Court below, although the evidence raises some doubt.

Parker vs. Phetteplace, 1 Wall., 684.
Lytle vs. Arkansas, 22 How., 193.

When the question is wholly one of the weight of evidence the judgment will be affirmed.

Harrell vs. Beall, 17 Wall., 590.
Alviso vs. U. S., 8 Wall., 337.

4. *A mortgage of partnership property may be made by one co-partner to secure a debt of the firm.*

The Circuit Court having found that Walter B. Crane, the mortgagor, owned in his own right individually the three undivided fourths of the lands, which he mortgaged to the

Bank, and having found "that there was no evidence to show any special trust which would restrict or qualify Crane's right to make an absolute conveyance of his undivided three-fourths interest in said real estate"—judicially concluded all questions of fact as to Crane, "as one co-partner," mortgaging "co-partnership property," and all necessity for discussing the questions of law as the right of one co-partner to mortgage partnership property to secure the debt of the firm.

It became superfluous, although it was good law for the Court, then, to say that "it is unnecessary to consider the question whether the three-fourths in the land and fixtures appurtenant to the land were or were not partnership property, or whether, as such, were first liable to copartnership debts in priority to the individual interests of the copartners therein, because, assuming this to have been the nature of the property, the mortgage of the partnership assets by one co-partner for the benefit of the copartnership without the assent of the other partner would, in the absence of fraud, (which is not here suggested,) be undoubtedly valid as a security for a particular creditor to whom it was mortgaged, *a fortiori*, if made with the assent, express or implied, of the other partner, who, as in the case of D. R. Smith, knew of the mortgage, did not object, and who participated in the benefit of the extension of the debt, which the firm of D. R. Smith & Co. obtained from the Bank."

It has been held in New York that "one partner has authority to sell and transfer all the copartnership effects directly to a creditor of the firm in payment of a debt, without the knowledge or consent of his copartner, although the latter is at the place of business and might be consulted.

"Nor is such transfer invalid, although the firm is insolvent, and thereby the one creditor acquires a preference over the other creditors of the firm."

Mabbett vs. White, 12 N. Y., 442.

(See *Graser vs. Stellwagen, 25 N. Y., 315; Egberts vs. Wood, 3 Paige, 517; Harrison vs. Sterry, 5 Cranch; Anderson vs. Tompkins, 1 Brock. R., 456; Fox vs. Hamburg, Cowper, 445; Piersons vs. Hooker, 3 Johns, R., 68; Robinson vs. Crowder, 4 McCord's R., 519; Mill vs. Barber, 4 Day's R., 428; Tapley vs.*

Butterfield, 1 Mete., 515; 3 Kent, 44; Halsey vs. Whitney, 4 Mason, 206; Smith's Merc. Law, 79; Collyer on Part. by Perkins, Secs. 384, 394, 395; Story on Part., Sec. 101; Cary, 25, 29, 30; Watson on Part., 105; Morgan vs. Marquis, 9 Exch. R., 145; Gow. A. P. C., 132, 135, a.; 4 B & C., 867.)

"A conveyance by one partner, having legal title to an undivided half of real estate, the whole of which in equity is partnership property, to a creditor of the firm in payment of a partnership debt, vests good title in such undivided half in his grantee, notwithstanding it is executed without the knowledge or consent of the other partnership, the firm is insolvent, and its effect is to give a preference to the grantee."

Van Brunt vs. Applegate, 44 N. Y., 544

By Chancellor Kent:

"An absent partner may be bound by a deed executed on behalf of the firm by his copartner, provided there be either a previous parol authority, or a subsequent parol adoption of the Act."

3 Kent, 48, Citing Skinner vs. Dayton, 19 John, 512.

"Such authority need not be under seal, nor in writing, nor specially communicated for the purpose, but manifested from the partnership itself, and the subsequent conduct of the copartner implying an assent to the act." Ib., n. b.

In South Carolina it has been held, (1890) that

"A partner who shares the profits of the firm business with knowledge that realty held in the partnership name has been mortgaged to secure advances which were used in the partnership business, and shares the proceeds, will not be heard, in action to foreclosure, to assert for the first time, that his partner executed the mortgage without his authority, knowledge or consent."

Salinas vs. Bennett, 33 So. Ca., 285.

c. The accountability of defendants for rents and profits and for waste.

The cases referred to in appellant's brief might be appropripriate to a question between mortgagor and mortgagee, or between the National Bank of Rondout as mortgagee and Crane as mortgagor, but have no pertinence to the issue in this case. between the complainant the National Bank of Rondout whose security, as the decree establishes has been materially injured and diminished by the acts of Thomas R. McGahan and his lessee, Elizabeth P. Smith, whom the decree finds to have entered upon the lands without title, or warrant of law and to have cut and sold the timber from the mortgaged premises, from 1885 to the date of the decree in derogation of the rights of both the mortgagee the Bank and of Crane the mortgagor.

The bill charged, p. 3, f. 4, that under the deed of the marshal in 1885, Thomas R. McGahan had entered upon the lands covered by mortgage of Crane to the Bank had "leased the same to Elizabeth P. Smith, wife of D. R. Smith; that said lands are timber lands of great value because of the timber thereon and are only valuable for this reason: * * * * * that the said Thomas R. McGahan or his tenant or some person by his authority have been and are cutting down the timber on said land and have removed and are removing the same, thus committing waste upon and destroying the value of the said land and of the security held by said bank.

The defendants in their answer admit these allegations (p. 8, f. 11); say that "the defendant Elizabeth P. Smith is now in possession of said premises under a lease from the said Thomas R. McGahan and carrying thereon the business of manufacturing lumber and for that purpose has used such timber as is necessary for said purpose," and the said Thomas R. McGahan says: "that by virtue of said sale and purchase as aforesaid he became and is the owner of the premises described in said mortgage, and that the said premises having by the terms of the articles of copartnership been held as and for copartnership property were first liable to copartnership debts in priority

to the individual interest of the copartners therein; and that by virtue of the sale and his purchase as aforesaid he is entitled to hold and enjoy the same free from the lien of said mortgage."

No pretense is here made of claim by defendants to any rights of a *mortgagor* in possession, such as is put forward in the argument of appellant's counsel. The defendants stake their whole defense against the charge of waste and the accountability therefor and for rents and profits upon McGahan's claim of absolute ownership of the whole property under the marshal's sale and deed.

The Circuit Court held (p. 65, f. 10) that "the title which Thomas R. McGahan, as purchaser, acquired under the sale and conveyance in September, 1885, made by the marshal under the execution against D. F Smith & Co., and the individual interest of D. R. Smith, could be no better or higher than that which the firm had or could have claimed in the property so sold and conveyed. As D. R. Smith & Co. and D. R. Smith could not have claimed to hold the property in derogation of the right to the three-fourths interest therein of the National Bank of Rondout under the mortgage given to it in 1883 to secure the debt of D. R. Smith & Co., so the defendant, Thomas R. McGahan, cannot claim against the rights of the bank to the three undivided fourths in said land and improvements and fixtures."

If the judgment of the Circuit Court is correct in so holding, then the accountability for waste and for rents and profits follows as a necessary sequence in the exercise of the equitable jurisdiction for relief.

It will be noted, that no error on this point is assigned by appellants, and their whole reliance is upon the effort to show that the real estate of which McGahan had possessed himself was copartnership property, "and that the Court erred in decreeing the account for rents and profits in that a mortgagee in South Carolina has no estate in the mortgaged property and no right of possession, but only a lien for the satisfaction of his debt."

As we have said above, this latter plea might have been available to Crane or his heirs as mortgagor in an ordinary